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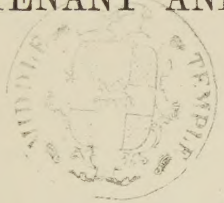

BY

WILLIAM HENRY GOVER, LL.B. (LOND.)

OF LINCOLN'S INN, BARRISTER-AT-LAW,
AUTHOR OF 'HINTS AS TO ADVISING ON TITLE.'

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PREFACE

TO THE FIRST EDITION.

The principles regulating the enjoyment of settled property by life-tenant and remainderman mainly depend on rules of administration laid down by Courts of Equity, which apply unless excluded by the expression of a contrary intention in the settlement.

The Author's aim has been to collect the reported cases by which these rules have been established, and the cases in which they have been held to be excluded, together with the statutes bearing on the subject: thus presenting in a concise form, the rights of life-tenant and remainderman in respect of profits and proceeds of settled property, and their liabilities in respect of outgoings, outlay, and losses.

It has not been found necessary to distinguish between property settled by deed and property settled by will, except in the case of residuary personal estate, in respect of which distinctions exist as to the right of the life-tenant to enjoyment in specie, which are considered in a separate chapter.

10, Old Square, Lincoln's Inn,
1*st January*, 1901.

NOTE

TO THE SECOND EDITION.

In this edition the text has been revised throughout, and the chapter on Losses has been re-written in view of recent decisions. The reported cases up to the end of 1909 have been incorporated, and the principal Irish decisions have been added, making altogether more than 160 additional cases.

W. H. G.

10, Old Square, Lincoln's Inn,
January, 1910.

CONTENTS.

PAGE

TABLE OF CASES ix

TABLE OF STATUTES. xxxix

CHAPTER I.

RENTS AND PROFITS 1

CHAPTER II.

TIMBER AND MINERALS 25

CHAPTER III.

PROCEEDS OF SALE 42

CHAPTER IV.

OUTGOINGS 51

CHAPTER V.

IMPROVEMENTS 66

CHAPTER VI.

RENEWAL AND ENFRANCHISEMENT 88

CHAPTER VII.

COSTS AND EXPENSES 96

CHAPTER VIII.

PAGE
INCUMBRANCES 106

CHAPTER IX.

LOSSES 123

CHAPTER X.

RESIDUARY PERSONALTY 132

INDEX 159

TABLE OF CASES.

PAGE

ABRAHALL *v.* Hamilton, (1859) 10 Ir. Ch. Rep. 51 . . . 133
Acton *v.* Crawley (1885). *See* Crawley, *Re.*
Adair, *Re*, (1873) 16 Eq. 124 ; 42 L. J. Ch. 841 . . . 95
Adderley *v.* Clavering, (1789) 2 Cox, 192 ; 2 Bro. C. C. 659 . 89
Ainslie, *Re*, (1885) 30 Ch. D. 485 ; 55 L. J. Ch. 615 ; 53 L. T. 645 ; 33 W. R. 910 25
Ainslie *v.* Harcourt, (1860) 28 Beav. 313 ; 30 L. J. Ch. 686 91, 92
Alcock *v.* Sloper, (1833) 2 My. & K. 699 ; 39 R. R. 334 137, 145
Alden *v.* Kennerley, (1862) 7 L. T. 312 58
Aldred, *Re*, (1882) 21 Ch. D. 228 ; 51 L. J. Ch. 942 ; 46 L. T. 379 ; 30 W. R. 777 60
Alford, *Re*, (1886) 32 Ch. D. 383 ; 54 L. T. 674 ; 34 W. R. 773 . . . . . 16, 17
Allan, *Re*, (1881). *See* Havelock *v.* Havelock.
Allan *v.* Backhouse, (1813) 2 V. & B. 65 ; Jac. 631 ; 13 R. R. 23 . . . . . 88, 91
Allen *v.* Embleton, (1858) 4 Dr. 226 ; 27 L. J. Ch. 297 ; 4 Jur. N. S. 79 ; 6 W. R. 272 . . . . . 52, 57
Allhusen *v.* Whittell, (1867) 4 Eq. 295 ; 36 L. J. Ch. 929 ; 16 L. T. 695 . . . . . 132, 135, 136, 140
Alsbury, *Re*, (1890) 45 Ch. D. 237 ; 60 L. J. Ch. 29 ; 63 L. T. 576 ; 39 W. R. 136 . . . . . 12, 13
Alston, *Re*, (1901) 2 Ch. 584 ; 70 L. J. Ch. 869 . . 126, 130
Alston *v.* Houston, (1901). *See* Alston, *Re.*
Amphlett *v.* Parke, (1827) 1 Sim. 275 ; 5 L. J. O. S. Ch. 139 132
Ancketill, *Re*, (1891) 27 L. R. Ir. 331 126
Anderson *v.* Read, (1874) 22 W. R. 527 4
Andrew *v.* Andrew, (1845) 1 Coll. 690 8
Andrew *v.* Williames (1885). *See* Williams, *Re.*
Andrews *v.* Weall (1889). *See* Weall, *Re.*
Angerstein *v.* Martin, (1823) T. & R. 232 ; 2 L. J. O. S. Ch. 88 ; 24 R. R. 32 136
Anonymous, (1729) Mos. 237 31
Anonymous, (1828) 4 Russ. 473 ; 28 R. R. 155 98
Anson, *Re*, (1907) 2 Ch. 424 ; 76 L. J. Ch. 641 ; 97 L. T. 472 14
Arathoon *v.* Dawson (1906). *See* Dawson, *Re.*
Armitage, *Re*, (1893) 3 Ch. 337 ; 63 L. J. Ch. 110 ; 69 L. T. 619 . . . . . 15, 49, 147
Armitage *v.* Garnett (1893). *See* Armitage, *Re.*
Arnold *v.* Ennis, (1853) 2 Ir. Ch. Rep. 601 138

PAGE

Ashby *v.* Hincks, (1888) 58 L. T. 557 32
Askew *v.* Woodhead, (1880) 14 Ch. D. 27; 49 L. J. Ch. 320; 42 L. T. 567; 28 W. R. 874 . . . . . 4, 45
Aspinwall *v.* Leigh, (1690) 2 Vern. 218 31
Aston *v.* Aston, (1749) 1 Ves. Sen. 264 32
Atkinson, *Re*, (1904) 2 Ch. 160; 73 L. J. Ch. 585; 90 L. T. 825; 53 W. R. 7 . . . . . 126, 127, 128, 130
A.-G. *v.* Aberdare, (1892) 2 Q. B. 684; 61 L. J. Q. B. 615; 67 L. T. 588 112
Aubrey, *Re*, (1853) 1 W. R. 464; 21 L. T. O. S. 192; 1 Eq. Rep. 249 102
Avis *v.* Newman (1889). *See* Cartwright, *Re*.
Aylesford, *Re*, (1886) 32 Ch. D. 162; 55 L. J. Ch. 523; 54 L. T. 414 102

Bacon, *Re*, (1893) 62 L. J. Ch. 445; 68 L. T. 522; 41 W. R. 478 133
Bagot, *Re*, (1894) 1 Ch. 177; 63 L. J. Ch. 515; 70 L. T. 229; 42 W. R. 170 98
Bagot *v.* Bagot, (1863) 32 Beav. 509; 33 L. J. Ch. 116; 2 N. R. 297; 9 Jur N. S. 1022; 9 L. T. 217; 12 W. R. 35 26, 28, 29, 36, 37, 40
Bagot *v.* Kittoe (1893). *See* Bagot, *Re*.
Bague *v.* Dumergue, (1853) 10 Ha. 462; 20 L. T. O. S. 322 . 124
Bainbridge *v.* Blair, (1855) 4 L. J. Ch. 207 . . . 96, 97
Baker, *Re*, (1891) 8 Times L. R. 7 11
Baker *v.* Sebright, (1879) 13 Ch. D. 179; 49 L. J. Ch. 65; 41 L. T. 614; 28 W. R. 177 33
Baldock *v.* Green (1888). *See* Green, *Re*.
Baldwin *v.* Baldwin, (1855) 4 Ir. Ch. Rep. 501 . . . 121
Baldwin *v.* Baldwin, (1856) 6 Ir. Ch. Rep. 156 . . . 108
Barber, *Re*, (1881) 18 Ch. D. 624; 50 L. J. Ch. 769; 45 L. T. 433; 29 W. R. 909 47
Barclay *v.* Wainewright, (1807) 14 Ves. 66; 9 R. R. 245 . 10
Baring, *Re*, (1893) 1 Ch. 61; 62 L. J. Ch. 50; 67 L. T. 702; 41 W. R. 87 . . . . . 58, 59, 89, 92
Baring *v.* Ashburton, (1868) 16 W. R. 452; W. N. 1868, 14 . 12
Barker, *Re* (1864). *See* Gorely, *Ex p.*
Barker, *Re*, (1897) W. N. 154 127
Barker *v.* Barker (1897). *See* Barker, *Re*.
Barker *v.* Perowne (1881). *See* Clarke, *Re*.
Barber's Co. *v.* Grose-Smith, (1904). *See* Atkinson, *Re*.
Barnes *v.* Bond, (1863) 32 Beav. 653 . . . . 107, 132
Barnes *v.* Dowling, (1881) 44 L. T. 809 . . . . 55, 56
Barney, *Re*, (1894) 3 Ch. 562; 63 L. J. Ch. 676; 71 L. T. 180; 43 W. R. 105 . . . . . 63, 68
Barrett, *Ex p.*, (1850) 19 L. J. Ch. 415; 15 Jur. 3; 15 L. T. O. S. 520 . . . . . 54, 60, 71
Barrett *v.* Fisher, (1905). *See* Francis, *Re*.
Barrington, *Re*, (1860) 1 J. & H. 142; 29 L. J. Ch. 807 . 60, 69
Barrington, *Re*, (1886) 33 Ch. D. 523; 56 L. J. Ch. 175; 55 L. T. 87; 35 W. R. 164 . . . . 29, 31, 40, 41, 46

PAGE
Barton, *Re*, (1868) 5 Eq. 238; 37 L. J. Ch. 194; 17 L. T. 594; 16 W. R. 392 . . . . . 10, 11
Bate *v.* Hooper, (1855) 5 D. M. & G. 338; 3 W. R. 639 143, 145
Bateman *v.* Hotchkin, (1862) 31 Beav. 486; 32 L. J. Ch. 6 . 28
Bates, *Re*, (1907) 1 Ch. 22; 76 L. J. Ch. 29; 95 L. T. 753 137, 139, 144, 148, 149
Bates *v.* Mackinley, (1862) 31 Beav. 280; 31 L. J. Ch. 389; 5 L. T. 783; 6 L. T. 208 . . . . . 14, 24
Battell, *Re*, (1872) 21 W. R. 138 98
Baud *v.* Fardell, (1855) 7 D. M. & G. 628; 25 L. J. Ch. 21; 1 Jur. N. S. 1214 137
Baynard *v.* Woolley, (1855) 20 Beav. 583 131
Beauclerk *v.* Ashburnham, (1845) 8 Beav. 322 . . . 99
Beaufoy, *Re*, (1852) 1 Sm. & G. 20; 16 Jur. 1084; 22 L. J. Ch. 430; 20 L. T. O. S. 176; 1 W. R. 14 . . . 44
Beavan *v.* Beavan, (1869) 24 Ch. D. 649, n.; 52 L. J. Ch. 961, n. 155
Beck, *Re*, (1883) 24 Ch. D. 608; 52 L. J. Ch. 815; 49 L. T. 95 104
Bedoyere *v.* Greville Nugent, (1890) 25 L. R. Ir. 143 . . 32
Benn *v.* Dixon, (1840) 10 Sim. 636; 4 Jur. 575; 9 L. J. Ch. 259 138
Bennett, *Re*, (1896) 1 Ch. 778; 65 L. J. Ch. 422; 74 L. T. 157; 44 W. R. 419 . . . . . 52, 53, 96
Bennett *v.* Colley, (1832) 2 My. & K. 225; Coop. 248; 35 R. R. 135. 93
Bennett *v.* Wyndham, (1857) 23 Beav. 521; 4 D. F. & J. 259; 29 L. T. O. S. 138; 5 W. R. 410 . . . . 113, 114
Bentham, *Re*, (1906) 94 L. T. 307 . . . 144, 150, 153
Berkeley, *Re*, (1874) 10 Ch. 56; 44 L. J. Ch. 3; 31 L. T. 531; 23 W. R. 195 . . . . . 102, 103
Bethune *v.* Kennedy, (1835) 1 My. & Cr. 114; 43 R. R. 153 152
Betty, *Re*, (1899) 1 Ch. 821; 68 L. J. Ch. 435; 80 L. T. 675 . 52, 53, 58
Betty *v.* A.-G. (1899). *See* Betty, *Re*.
Bevan *v.* Waterhouse, (1876) 3 Ch. D. 752; 46 L. J. Ch. 331 121
Bewick *v.* Whitfield, (1734) 3 P. Wms. 267 . . 26, 27, 28, 30
Birch, *Re*, (1864) 10 L. T. 690; 10 Jur. N. S. 673 . . 44, 45
Birch Wolfe *v.* Birch, (1870) 9 Eq. 683; 39 L. J. Ch. 345; 23 L. T. 216; 18 W. R. 594 . . . . 27, 29, 35, 36
Bird, *Re*, (1901) 1 Ch. 916; 70 L. J. Ch. 514; 84 L. T. 294; 49 W. R. 599 . . . . . 123, 128, 130, 131
Bishop *v.* Bishop, (1841) 10 L. J. Ch. 302; 5 Jur. 931 . . 30
Blackmore *v.* White, (1899) 1 Q. B. 293; 68 L. J. Q. B. 180; 80 L. T. 79; 47 W. R. 448 56
Blagrave, *Re*, (1903) 1 Ch. 560; 72 L. J. Ch. 317; 88 L. T. 253; 51 W. R. 437 . . . . . 79, 81, 82, 83
Blake, *Re*, (1895) 72 L. T. 280 101
Blake *v.* O'Reilly, (1895) 1 I. R. 479 . . . . 106, 114
Blann *v.* Bell, (1852) 5 D. G. & S. 658; 2 D. M. & G. 775; 16 Jur. 1103; 22 L. J. Ch. 236; 20 L. T. O. S. 162 138, 139, 144, 152

PAGE
Bond *v.* Biggs, (1862) 6 L. T. 794 110
Boor, *Re*, (1889) 40 Ch. D. 572; 58 L. J. Ch. 285; 60 L. T. 412; 37 W. R. 349 65
Boor *v.* Hopkins (1889). *See* Boor, *Re*.
Bostock *v.* Blakeney, (1789) 2 Bro. C. C. 653 . . . 49, 60, 69
Bouch *v.* Sproule, (1887) 12 App. Cas. 385; 56 L. J. Ch. 1037; 57 L. T. 345; 36 W. R. 193 . . 11, 12, 13, 14
Boustead *v.* Cooper, (1901). *See* Van Straubenzee, *Re*.
Bowden *v.* Bowden, (1849) 17 Sim. 65 149
Bowering *v.* Field (1888). *See* Field, *Re*.
Bowes, *Re*, (1862) 10 L. T. 598 103
Bowlby, *Re*, (1904), 2 Ch. 685; 73 L. J. Ch. 810; 91 L. T. 573; 53 W. R. 270 . . . . . 17, 136
Bowlby *v.* Bowlby, (1904). *See* Bowlby, *Re*.
Bowra *v.* Rhodes, (1862) 10 W. R. 747; 8 Jur. N. S. 1050 . 111
Bowyer, *Re*, (1892) W. N. 48; 36 S. J. 347 48
Box, *Re*, (1863) 1 H. & M. 552; 33 L. J. Ch. 42; 9 L. T. 372; 3 N. R. 65; 12 W. R. 67 121
Boys *v.* Boys, (1860) 28 Beav. 436 151
Brackenbury, *Re*, (1870) 10 Eq. 45; 39 L. J. Ch. 635; 22 L. T. 469 98
Bradbrook, *Re*, (1887) 56 L. T. 106 58
Bradford *v.* Brownjohn, (1868) 3 Ch. 711; 38 L. J. Ch. 10; 19 L. T. 248; 16 W. R. 1178 . . . . . 88, 89, 90
Brander *v.* Brander, (1799) 4 Ves. 800; 4 R. R. 348 . . 11
Brandreth *v.* Colvin (1895). *See* Pitcairn, *Re*.
Brereton *v.* Day, (1895) 1 I. R. 518 58
Breton *v.* Mockett, (1878) 9 Ch. D. 95; 47 L. J. Ch. 754 . 9
Briant *v.* Rosher (1899). *See* Rosher, *Re*.
Bridges *v.* Stephens, (1817) 2 Sw. 150, n. 31
Briggs *v.* Oxford, (1852) 1 D. M. & G. 363; 21 L. J. Ch. 829; 16 Jur. 558; 18 L. T. O. S. 341 35
Briggs *v.* Oxford, (1855) 3 W. R. 588; 1 Jur. N. S. 817; 25 L. T. O. S. 365 35
Briggs *v.* Sharp, (1875) 20 Eq. 317; 44 L. J. Ch. 510; 33 L. T. 154; 23 W. R. 806 8
Brigstocke *v.* Brigstocke, (1878) 8 Ch. D. 357; 47 L. J. Ch. 817; 38 L. T. 760; 26 W. R. 761 . . . . 4, 5, 8
Brindley *v.* Partridge (1879). *See* Norrington, *Re*.
Bristol, *Re*, (1893) 3 Ch. 161; 62 L. J. Ch. 901; 69 L. T. 304; 42 W. R. 46 . . . . . 86, 117
Broadwater, *Re*, (1885) 54 L. J. Ch. 1104; 53 L. T. 745; 33 W. R. 738 80
Broadwood, *Re*, (1908) 1 Ch. 115; 77 L. J. Ch. 18; 98 L. T. 217 . . . . . 127, 130
Broadwood *v.* Broadwood (1907). *See* Broadwood, *Re*.
Bromley, *Re*, (1886) 55 L. T. 145 . . . . . 14, 49
Brown *v.* Gellatly, (1867) 2 Ch. 751; 17 L. T. 131; 15 W. R. 1188 . . . . . 136, 139, 141
Brown *v.* Perkins (1907). *See* Perkins, *Re*.
Browne *v.* Browne, (1860) 2 Gif. 304; 6 Jur. N. S. 1143; 3 L. T. 119; 8 W. R. 726 . . . . . 16, 122
Browne *v.* Collins, (1871) 12 Eq. 586 23

PAGE
Browne *v.* Stoughton, (1846) 14 Sim. 369; 15 L. J. Ch. 391; 10 Jur. 747 18
Bruce, *Re*, (1905) 2 Ch. 372; 74 L. J. Ch. 578; 93 L. T. 119; 54 W. R. 60 . . . . . 93, 95
Brunskill *v.* Caird, (1873) 16 Eq. 493; 43 L. J. Ch. 163; 29 L. T. 365 . . . . . 55, 60, 70
Bryant *v.* Easterson, (1859) 7 W. R. 298; 5 Jur. N. S. 166; 32 L. T. O. S. 352 9
Brydges *v.* Stephens, (1821) 6 Madd. 279; 23 R. R. 217 . 27
Bubb *v.* Yelverton, (1870) 10 Eq. 465; 40 L. J. Ch. 38; 18 W. R. 1127 33
Buckeridge *v.* Ingram, (1795) 2 Ves. Jun. 652 . . . 88
Bulkeley *v.* Stephens, (1863) 3 N. R. 105; 10 L. T. 225 50, 147
Bulkeley *v.* Stephens, (1896) 2 Ch. 241; 65 L. J. Ch. 597; 74 L. T. 409; 44 W. R. 490 . . . . . 21, 49, 50
Bull *v.* Birkbeck, (1843) 2 Y. & C. Ch. 447; 1 L. T. O. S. 359 94
Bull *v.* Smith (1901). *See* Smith, *Re*.
Bullock, *Re*, (1904) 91 L. T. 651 94
Bulwer *v.* Astley, (1844) 1 Ph. 422; 8 Jur. 523; 13 L. J. Ch. 329; 3 L. T. O. S. 70 111
Burges *v.* Lamb, (1809) 16 Ves. 174; 10 R. R. 150 . . . 35
Burges *v.* Mawbey, (1823) T. & R. 167; 24 R. R. 9 . 106, 108
Burkett *v.* Spray, (1829) 1 Russ. & M. 113 104
Burn, *Re*, (1879) W. N. 26 43
Burrell *v.* Egremont, (1844) 7 Beav. 205; 8 Jur. 587; 13 L. J. Ch. 309; 3 L. T. O. S. 72 . . 118, 119, 120, 121
Burton, *Re*, (1892) 2 Ch. 38; 61 L. J. Ch. 702; 67 L. T. 221 . 1
Burton *v.* Mount, (1848) 2 De G. & S. 383; 12 Jur. 934; 11 L. T. O. S. 492 . . . . . 149, 151
Bute, *Re*, (1884) 27 Ch. D. 196; 53 L. J. Ch. 1090; 32 W. R. 996. 69
Bute *v.* Ryder (1884). *See* Bute, *Re*.
Butler *v.* Borton, (1820) 5 Madd. 40; 21 R. R. 272 . 27, 34
Butler *v.* Kynnersley, (1830) 8 L. J. O. S. Ch. 67; 15 Beav. 10, n.; 33 R. R. 180 33
Byng, *Re*, (1892) 2 Ch. 219; 61 L. J. Ch. 511; 66 L. T. 754; 40 W. R. 457 87

Cafe *v.* Bent, (1845) 5 Ha. 24 . . . . . 137, 153
Caldecott *v.* Brown, (1842) 2 Ha. 144; 7 Jur. 693 . 66, 69
Caldecott *v.* Caldecott, (1842) 1 Y. & C. Ch. 312, 737; 6 Jur. 232, 1032; 11 L. J. Ch. 158, 414 . . . 132, 136, 137, 140, 141, 146
Caldwall *v.* Baylis, (1817) 2 Mer. 408; 16 R. R. 189 . . 58
Calverley, *Re*, (1904) 1 Ch. 150; 73 L. J. Ch. 25; 89 L. T. 500; 52 W. R. 206 . . . . . 78, 81, 82, 85, 86
Campbell *v.* Wardlaw, (1883) 8 App. Cas. 641 . 4, 36, 37, 39
Capel *v.* Wood, (1828) 4 Russ. 500; 3 L. J. O. S. Ch. 91; 28 R. R. 162 91
Capron *v.* Capron, (1874) 17 Eq. 288; 43 L. J. Ch. 677; 29 L. T. 826; 22 W. R. 347 24
Cardigan *v.* Curzon-Howe, (1889) 41 Ch. D. 375; 58 L. J. Ch. 436; 60 L. T. 723; 37 W. R. 521 104

PAGE
Cardigan *v.* Curzon-Howe, (1893) 9 Times L. R. 244 . . 86
Cardigan *v.* Curzon-Howe, (1898) 14 Times L. R. 550 . . 46
Carr *v.* Com. Union Insce. Co. (1906). *See* McClure, *Re.*
Carr *v.* Griffith (1879). *See* Griffith, *Re.*
Carter, *Re*, (1892) 41 W. R. 140 . . . . . 3, 146, 153
Carter *v.* Sebright, (1859) 26 Beav. 374 ; 5 Jur. N. S. 259 ; 28 L. J. Ch. 411 ; 32 L. T. O. S. 348 ; 7 W. R. 225 . 94, 97
Cartington, *Re* (1883). *See* Beck, *Re.*
Cartwright, *Re*, (1889) 41 Ch. D. 532; 58 L. J. Ch. 590 ; 60 L. T. 891 ; 37 W. R. 612 54
Casamajor *v.* Strode, (1809) 19 Ves. 390, n. 3
Castellain *v.* Preston (1883) 11 Q. B. D. 380 ; 52 L. J. Q. B. 366 ; 49 L. T. 29 ; 31 W. R. 557 . . . . . 6, 7
Castlemaine *v.* Craven, (1733) 2 Eq. Cas. Abr. 758 . . 28
Caulfield *v.* Maguire, (1845) 2 Jo. & Lat. 141 ; 8 Ir. Eq. Rep. 164 . . . . . 5, 107, 109
Cavendish, *Re*, (1877) W. N. 198 29
Cavendish *v.* Mundy (1877). *See* Cavendish, *Re.*
Chamberlyne *v.* Dummer, (1782) 1 Bro. C. C. 166 ; 3 Bro. C. C. 549 34
Chambers *v.* Chambers, (1846) 15 Sim. 183 ; 10 Jur. 326 ; 15 L. J. Ch. 318 ; 7 L. T. O. S. 385 138
Chancellor, *Re*, (1884) 26 Ch. D. 42 ; 53 L. J. Ch. 443 ; 51 L. T. 33 ; 32 W. R. 465 . . . . 138, 141, 146, 147
Chancellor *v.* Brown (1884). *See* Chancellor, *Re.*
Chaytor, *Re*, (1900) 2 Ch. 804 ; 49 W. R. 125 . . . 37, 39
Chaytor, *Re*, (1905) 1 Ch. 233 ; 74 L. J. Ch. 106 ; 92 L. T. 290 ; 53 W. R. 251 . . . . 136, 140, 142, 146, 147
Chaytor *v.* Horn (1904). *See* Chaytor, *Re.*
Chaytor *v.* Trotter, (1902) 87 L. T. 33 37
Chesterfield, *Re*, (1883) 24 Ch. D. 643 ; 52 L. J. Ch. 958 ; 49 L. T. 261 ; 32 W. R. 361. . . . . 100, 155
Cholmondeley, *Re* (1885). *See* Houghton, *Re.*
Clapham, *Re*, (1886) W. N. 1886, 54 ; 2 Times L. R. 424 16, 125
Clarges *v.* Albemarle, (1692) 2 Vern. 245 ; Nelson, 174 . . 8
Clarke, *Re*, (1881) 18 Ch. D. 160 ; 50 L. J. Ch. 733 ; 44 L. T. 736 ; 29 W. R. 730. 24
Clarke, *Re*, (1882) 21 Ch. D. 776 ; 52 L. J. Ch. 88 . . 103
Clarke, *Re*, (1902) 2 Ch. 327 ; 71 L. J. Ch. 593 ; 86 L. T. 653 ; 50 W. R. 585 . . . . . 82, 83
Clarke *v.* Thornton, (1887) 35 Ch. D. 307 ; 56 L. J. Ch. 302 ; 56 L. T. 294 ; 35 W. R. 603 . . . . . 59, 61, 84
Clavering *v.* Clavering, (1726) 2 P. Wms. 388 . . 36, 37
Claxton *v.* Claxton, (1690) 2 Vern. 152 35
Clayton *v.* Gresham, (1804) 10 Ves. 288 11
Cleveland, *Re*, (1894) 1 Ch. 164 ; 63 L. J. Ch. 115 ; 69 L. T. 807 65
Cleveland, *Re*, (1895) 2 Ch. 542 ; 65 L. J. Ch. 29 ; 73 L. T. 313 124
Clifford *v.* Washington (1879). *See* Smith, *Re.*
Clifford, *Re*, (1902) 1 Ch. 87 ; 71 L. J. Ch. 10 ; 85 L. T. 410 ; 50 W. R. 58 105
Clifton *v.* Darnley (1906). *See* Darnley, *Re.*

PAGE
Cline, *Re*, (1874) 18 Eq. 213; 30 L. T. 249; 22 W. R. 512 . 21
Clitheroe, *Re*, (1869) 17 W. R. 345; 20 L. T. 6; W. N. 1869, 26 61
Clive *v.* Clive, (1854) Kay, 600; 2 Eq. Rep. 913; 23 L. J. Ch. 981. . . . . 8, 22, 121
Clutterbuck, *Re*, (1901) 2 Ch. 285; 70 L. J. Ch. 614; 84 L. T. 757; 49 W. R. 583. 18
Cockayne *v.* Harrison, (1872) 13 Eq. 432; 41 L. J. Ch. 509; 26 L. T. 385; 20 W. R. 504 . . . . . 8, 9
Cockran *v.* Cockran, (1844) 14 Sim. 248 1
Coffin *v.* Coffin, (1821) Jac. 70; 23 R. R. 1 32
Colegrave *v.* Manby, (1826) 2 Russ. 238; 22 R. R. 245 . . 93
Coles *v.* Courtier (1886). *See* Courtier, *Re*.
Collins *v.* Collins, (1833), 2 My. & K. 703; 39 R. R. 337 . 151
Collins, *Re*, (1886) 32 Ch. D. 229; 55 L. J. Ch. 672; 55 L. T. 21; 34 W. R. 650 17
Collins *v.* Collins (1886). *See* Collins, *Re*.
Collis, *Re*, (1866) 14 L. T. 352; W. N. 1866, 167 . . . 44
Colyer, *Re*, (1886) 55 L. T. 344 8
Combe *v.* Hughes, (1865) 12 L. T. 438 17
Conolly *v.* Barter, (1904) 1 I. R. 130 120
Constable *v.* Constable, (1879) 11 Ch. D. 681; 48 L. J. Ch. 621; 40 L. T. 516 24
Conway *v.* Fenton, (1888) 40 Ch. D. 512; 58 L. J. Ch. 282; 59 L. T. 928; 37 W. R. 156 60
Cooke *v.* Cholmondeley, (1857) 4 Dr. 244; 5 W. R. 835 . 108
Cooke *v.* Cholmondeley, (1858) 4 Dr. 326; 4 Jur. N. S. 827; 27 L. J. Ch. 826; 32 L. T. O. S. 59; 6 W. R. 802 59, 68
Cooper *v.* Gjers (1899). *See* Gjers, *Re*.
Cooper *v.* Laroche, (1869) 38 L. J. Ch. 591; W. N. 1869, 202 141, 148
Coote *v.* Milltown, (1844) 1 Jo. & Lat. 501; 7 Ir. Eq. Rep. 391. 110
Coote *v.* O'Reilly, (1844) 1 Jo. & Lat. 455 . . . 108, 111
Copland, *Re*, (1900) 1 Ch. 326; 69 L. J. Ch. 240; 82 L. T. 194 57, 63
Cordwell *v.* Lever (1896). *See* Lever, *Re*.
Cotton *v.* Cotton, (1850) 14 Jur. 950 . . . . 144, 152
Cottrell *v.* Cottrell, (1885) 28 Ch. D. 628; 54 L. J. Ch. 417; 52 L. T. 486; 33 W. R. 361 48
Courtier, *Re*, (1886) 34 Ch. D. 136; 56 L. J. Ch. 350; 55 L. T. 574; 35 W. R. 85 . . . . . 57, 58, 146
Courtier *v.* Coles (1886). *See* Courtier, *Re*.
Coventry *v.* Coventry, (1837) 1 Keen, 758; 6 L. J. Ch. 275; 44 R. R. 169 98
Cowley *v.* Wellesley, (1866) 1 Eq. 656; 35 Beav. 638; 14 L. T. 245. . . . . 5, 8, 26, 37, 39, 69, 96
Cowley *v.* Wellesley, (1877) 46 L. J. Ch. 869. . . . 60, 69
Cox, *Re*, (1878) 9 Ch. D. 159; 47 L. J. Ch. 735; 27 W. R. 53 23
Cox *v.* Cox, (1869) 8 Eq. 343; 38 L. J. Ch. 569; 17 W. R. 790 123, 128, 129
Craig *v.* Wheeler, (1860) 29 L. J. Ch. 374; 3 L. T. 142; 8 W. R. 172. . . . . 138, 144, 152, 153

PAGE
Cranley *v.* Dixon, (1857) 23 B. 512 ; 3 Jur. N. S. 531 ; 26 L. J. Ch. 529 ; 29 L. T. O. S. 119 135
Crawley, *Re*, (1885) 28 Ch. D. 431 ; 54 L. J. Ch. 652 ; 52 L. T. 460 ; 33 W. R. 611. . . . . 63, 64
Crawley *v.* Crawley, (1835) 7 Sim. 427 ; 4 L. J. Ch. 265 ; 40 R. R. 170 . . . . . 135, 142
Cridland *v.* Luxton, (1834) 4 L. J. Ch. 65 . . . 88, 90
Croggan *v.* Allen, (1882) 22 Ch. D. 101 ; 47 L. T. 437 ; 31 W. R. 319. . . . . 98, 99
Croker, *Re*, (1877) W. N. 38 70
Crosse *v.* Glennie, (1843) 2 Y. & C. Ch. 237 ; 7 Jur. 274 . 17
Crowe *v.* Crisford, (1853) 17 Beav. 507 ; 2 W. R. 45 . 59, 68, 152, 153, 157
Crowther, *Re*, (1895) 2 Ch. 56 ; 64 L. J. Ch. 537 ; 72 L. T. 762 ; 43 W. R. 571 147
Cuddon *v.* Cuddon, (1876) 4 Ch. D. 583 ; 46 L. J. Ch. 257 ; 25 W. R. 341 . . . . . 112, 120
Curtis, *Re*, (1885), 1 Times L. R. 332 14

Daines *v.* Eaton (1894). *See* Eaton, *Re*.
Dale *v.* Hayes, (1870) 40 L. J. Ch. 244 ; 24 L. T. 12 ; 19 W. R. 299 ; W. N. 1870, 270 . . . . . 11, 14
Dalison, *Re*, (1892) 3 Ch. 522 ; 61 L. J. Ch. 712 ; 41 W. R. 15 117
Daly *v.* Beckett, (1857) 24 Beav. 114 ; 3 Jur. N. S. 754 . 36, 39
Daniel *v.* Warren, (1843) 2 Y. & C. Ch. 290 ; 7 Jur. 462 144, 145
Daniell, *Re*, (1894) 3 Ch. 503 ; 64 L. J. Ch. 173 . . . 61
Dare *v.* Hopkins, (1788) 2 Cox, 110 29
Darnley, *Re*, (1907) 1 Ch. 159 ; 76 L. J. Ch. 58 ; 95 L. T. 706 3, 38
Dashwood *v.* Magniac, (1891) 3 Ch. 306 ; 60 L. J. Ch. 809 ; 65 L. T. 811 . . . . . 25, 26, 27, 33, 36, 37, 62
Davies, *Ex p.*, (1852) 16 Jur. 882 97
Davies, *Re* (1858). *See* Davis, *Ex p.*
Davies *v.* Harrison, (1907). *See* Lewis, *Re*.
Davies *v.* Wescomb, (1828) 2 Sim. 425 ; 29 R. R. 128 . . 31
Davis, *Ex p.*, (1858) 3 De G. & J. 144 ; 4 Jur. N. S. 1029 ; 27 L. J. Ch. 712 ; 31 L. T. O. S. 339 ; 6 W. R. 844 . . 71
Davy, *Re*, (1908) 1 Ch. 61 ; 77 L. J. Ch. 67 ; 97 L. T. 654 . 90, 128, 155
Dawson, *Re*, (1906) 2 Ch. 211 ; 75 L. J. Ch. 604 ; 94 L. T. 817 ; 54 W. R. 556 . . . . . 133, 134
Day *v.* Merry, (1810) 16 Ves. 375 ; 10 R. R. 200 . . . 32
Debney *v.* Eckett, (1894) 43 W. R. 54 ; 71 L. T. 659 . . 59
De Gendre *v.* Kent, (1867) 4 Eq. 283 ; 16 L. T. 694 . . 24
De la Warr, *Re*, (1881) 16 Ch. D. 587 ; 44 L. T. 56 ; 29 W. R. 350. 101
De la Warr, *Re*, (1882) 46 L. T. 340 ; 51 L. J. Ch. 407 . . 101
Dent *v.* Dent, (1862) 30 Beav. 363 ; 8 Jur. N. S. 786 ; 31 L. J. Ch. 436 ; 10 W. R. 375 . . . . . 62, 66, 68
Denton *v.* Denton, (1844) 7 Beav. 388 ; 8 Jur. 388 . . 25
Derbishire *v.* Montagu (1897). *See* Montagu, *Re*.
Despard, *Re*, (1901) 17 Times L. R. 478 13

PAGE
De Stacpoole *v.* De Stacpoole, (1887) 37 Ch. D. 139 ; 57 L. J. Ch. 463 ; 58 L. T. 382 ; 36 W. R. 320 98
De Tabley, *Re*, (1896) 75 L. T. 328 ; (1896) W. N. 162 55, 59, 60
De Teissier, *Re*, (1893) 1 Ch. 153; 62 L. J. Ch. 552 ; 68 L. T. 275 ; 41 W. R. 184, 186 . . . 55, 56, 60, 61, 82, 83
De Teissier *v.* De Teissier (1893). *See* De Teissier, *Re*.
Dickin *v.* Hamer, (1860) 1 Dr. & Sm. 284 ; 29 L. J. Ch. 778 ; 2 L. T. 276 . . . . . 30, 39
Dickson-Poynder *v.* Cook (1881). *See* Poynder, *Re*.
Dillon *v.* Dillon, (1853) 4 Ir. Ch. 102 ; 6 Ir. Jur. 157 . . 108
Dimes *v.* Scott, (1828) 4 Russ. 195 ; 28 R. R. 46 . . 140, 154
Dimond *v.* Newburn (1897). *See* Freman, *Re*.
Dingle *v.* Coppen, (1899) 1 Ch. 726 ; 68 L. J. Ch. 337 ; 79 L. T. 693 ; 47 W. R. 279 58
Dixon, *Re*, (1902) 1 Ch. 248 ; 71 L. J. Ch. 96 ; 85 L. T. 622 ; 50 W. R. 203 112
Dixon *v.* Dutfield, (1862) 5 L. T. 741 16
Dixon *v.* Peacock, (1855) 3 Dr. 288 ; 25 L. T. O. S. 263 66, 106, 109
Dodd *v.* Evans, (1901). *See* Bird, *Re*.
Dolphin *v.* Aylward, (1864) 15 Ir. Ch. Rep. 583 ; 16 Ir. Jur. 141 121
Donaldson *v.* Donaldson, (1876) 3 Ch. D. 743 ; 34 L. T. 900 ; 24 W. R. 1037 67
Doran *v.* Wiltshire, (1792) 3 Sw. 699 ; 19 R. R. 287 . . 33
Dorning, *Re*, (1865) 14 W. R. 125 103
Douglas *v.* Congreve, (1836) 1 Keen, 410 ; 6 L. J. Ch. 51 ; 44 R. R. 103 140
Dover Coalfield, &c., Co., *Re*, (1908) 1 Ch. 65 ; 77 L. J. Ch. 94 ; 98 L. T. 31 ; 24 T. L. R. 52 15
Dowling, *Re*, (1876) 24 W. R. 729 ; 45 L. J. Ch. 568 . . 103
Downshire *v.* Sandys, (1801) 6 Ves. 107 . . . 32, 34
Drake *v.* Trefusis, (1875) 10 Ch. 364; 33 L. T. 85 ; 23 W. R. 762 . . . . . 60, 69, 70
Duckworth, *Re*, (1891) 35 S. J. 561 . . . . 140, 141
Duckworth *v.* Duckworth (1891). *See* Duckworth, *Re*.
Dufferin, *Re*, (1867) W. N. 75 127
Dummer, *Re*, (1865) 2 D. J. & S. 515 ; 11 Jur. N. S. 615 ; 34 L. J. Ch. 496 ; 13 W. R. 908 70
Dunn, *Re*, (1877) W. N. 39 75
Dunne *v.* Dunne, (1855) 3 Sm. & G. 22 ; 7 D. M. & G. 207 ; 1 Jur. N. S. 176, 1056 ; 3 Eq. Rep. 760 ; 25 L. T. O. S. 21, 60; 3 W. R. 380 . . . . 54, 55, 60, 66, 69
Dunraven, *Re*, (1907) 2 Ch. 417 ; 76 L. J. Ch. 591 ; 23 T. L. R. 691 . . . . . 80, 81, 83
Dyas, *Ex p.* (1888). *See* Navan *v.* Kingscourt R. Co.

Eade *v.* Nicholson (1909). *See* Nicholson, *Re*.
Eady *v.* Watson, (1864) 33 Beav. 481 ; 10 Jur. N. S. 982 ; 10 L. T. 285 ; 12 W. R. 682 99
Eaton, *Re*, (1894) 70 L. T. 761 ; (1894) W. N. 95 . . 138, 141
Edmondson *v.* Crosthwaite, (1864) 34 Beav. 30 . . . 11

PAGE
Edmunds *v.* Waugh, (1863) 2 N. R. 408 135
Egmont, *Re*, (1890) 45 Ch. D. 395; 59 L. J. Ch. 768; 63 L. T. 608; 38 W. R. 762 117
Egmont, *Re*, (1900) 16 Times L. R. 360 . . . . 79, 85
Egmont, *Re*, (1908) 1 Ch. 821; 77 L. J. Ch. 479; 98 L. T. 826 53
Egmont, *Re*, (1908) W. N. 176 . . . . . 84, 85
Egmont *v.* Lefroy, (1900). *See* Egmont, *Re*.
Elias *v.* Snowdon Slate Quarries Co., (1879) 4 App. Cas. 454; 48 L. J. Ch. 811; 41 L. T. 289; 28 W. R. 54 . . . 37
Ellis *v.* Barfield (1891). *See* Northage, *Re*.
Ellis *v.* Rowbotham, (1900) 1 Q. B. 740; 69 L. J. Q. B. 379; 82 L. T. 191; 48 W. R. 423 23
Elmore, *Re*, (1860) 9 W. R. 66; 6 Jur. N. S. 1325; 3 L. T. 359 152
Ely, *Re*, (1904) 1 I. R. 66 . . . . . 7, 8
England *v.* Downs, (1842) 6 Beav. 269 9
Entwistle *v.* Markland, (1795) 6 Ves. 528 n. 137
Equitable Life Ass. Co. *v.* Fuller, (1861) 30 L. J. Ch. 497; 7 Jur. N. S. 307; 4 L. T. 50 99
Esdaile, *Re*, (1886) 54 L. T. 637 115
Esdaile *v.* Esdaile (1886). *See* Esdaile, *Re*.
Evans, *Re*, (1872) 7 Ch. 609; 41 L. J. Ch. 512; 26 L. T. 815; 20 W. R. 695 . . . . . 98, 99
Evans, *Re* (1901). *See* Bird, *Re*.
Eyton, *Re*, (1888) W. N. 254. 103

Fane *v.* Goodall (1909). *See* Goodall, *Re*.
Farnham, *Re*, (1904) 2 Ch. 561; 73 L. J. Ch. 667; 91 L. T. 780 . . . . . 56, 63
Faulkener *v.* Daniel, (1840) 10 L. J. Ch. 33 110
Faulkner *v.* Daniel, (1843) 3 Ha. 199 . . . . 107, 110, 118
Fearns *v.* Young, (1804) 9 Ves. 549 . . . . . 138, 154
Fellowes *v.* Fellowes, (1901). *See* Clutterbuck, *Re*.
Ferguson *v.* Ferguson, (1886) 17 L. R. Ir. 522, 567 . . 68
Ferrand *v.* Wilson, (1845) 4 Ha. 344; 9 Jur. 860; 15 L. J. Ch. 41 . . . . . 28, 36, 40
Field, *Re*, (1888) W. N. 36 64
Field *v.* Brown, (1859) 27 Beav. 90 30
Finlay *v.* Howard, (1842) 2 Dru. & W. 490 98
Fitzgerald, *Re*, (1867) I. R. 1 Eq. 453 108
Fitzgerald *v.* Jervoise, (1820) 5 Madd. 25; 21 R. R. 268 . 3
Fitzherbert *v.* Weld, (1875) 24 W. R. 43; W. N. 1875, 147 113
Fitzmaurice *v.* Murphy, (1859) 8 Ir. Ch. 363; Drury (temp. Napier) 500 108
Fitzroy *v.* Hunloke (1902). *See* Hunloke, *Re*.
Fitzwilliams *v.* Kelly, (1852) 10 Ha. 266; 22 L. J. Ch. 1016. 94
Fletcher *v.* Stevenson, (1844) 3 Ha. 360; 13 L. J. Ch. 202; 8 Jur. 307 133
Flower, *Re*, (1890) 63 L. T. 201 156
Floyer *v.* Bankes, (1869) 8 Eq. 115 67

PAGE
Ford *v.* Tynte, (1864) 2 D. J. & S. 127 ; 3 N. R. 676 ; 10 Jur. N. S. 429 ; 10 L. T. 209 ; 12 W. R. 613 . . 32, 33
Foster, *Re*, (1890) 45 Ch. D. 629 ; 60 L. J. Ch. 175 ; 63 L. T. 443 ; 39 W. R. 31 126
Fowler, *Re*, (1881) 16 Ch. D. 723 ; 44 L. T. 99 ; 29 W. R. 891 57
Fowler *v.* Odell, (1881). *See* Fowler, *Re*.
Francis, *Re*, (1905) 74 L. J. Ch. 198 ; 92 L. T. 77 . . 15
Freake, *Re*, (1902) 1 Ch. 97 ; 71 L. J. Ch. 20 ; 85 L. T. 454 ; 50 W. R. 237 83
Freke *v.* Calmady (1886). *See* Hotchkys, *Re*.
Freman, *Re*, (1898) 1 Ch. 28 ; 67 L. J. Ch. 14 ; 77 L. T. 460 . . . . . 55, 56
Freman *v.* Whitbread, (1865) 1 Eq. 266 ; 35 L. J. Ch. 137 ; 13 L. T. 550 ; 14 W. R. 188 50
Frewen, *Re*, (1888) 38 Ch. D. 383 ; 57 L. J. Ch. 1052 ; 59 L. T. 131 ; 36 W. R. 840 115
Frewen *v.* James (1888). *See* Frewen, *Re*.
Frewen *v.* Law Life Ass. Soc., (1896) 2 Ch. 511 ; 65 L. J. Ch. 787 ; 75 L. T. 17 ; 44 W. R. 682 110
Frith *v.* Cameron, (1871) 12 Eq. 169 ; 40 L. J. Ch. 778 . . 67
Frowde *v.* Hengler (1892). *See* Hengler, *Re*.
Fullerton, *Re*, (1906) 2 Ch. 138 ; 75 L. J. Ch. 552 ; 94 L. T. 667 46
Fullerton *v.* Martin, (1860) 1 Dr. & Sm. 31 ; 6 Jur. N. S. 265 ; 29 L. J. Ch. 469 ; 1 L. T. 531 ; 8 W. R. 289 . . 135
Furley *v.* Hyder, (1873) 42 L. J. Ch. 626 . 139, 140, 141, 147

Gabellini *v.* Woods, (1904). *See* Woods, *Re*.
Game, *Re*, (1897) 1 Ch. 881 ; 66 L. J. Ch. 505 ; 76 L. T. 450 ; 45 W. R. 472 . . . . . 138, 144, 153
Game *v.* Young (1897). *See* Game, *Re*.
Gamlen *v.* Lyon (1886). *See* Barrington, *Re*.
Garden *v.* Ingram, (1852) 23 L. J. Ch. 478 ; 20 L. T. O. S. 17 6
Garth *v.* Cotton, (1753) 1 Ves. Sen. 524, 546 ; 3 Atk. 751 ; 1 Dick. 183 . . . . . 28, 34
Garton *v.* Cumberland (1909). *See* North, *Re*.
Gaskell, *Re*, (1894) 1 Ch. 485 ; 63 L. J. Ch. 243 ; 70 L. T. 554 ; 42 W. R. 219 . . . . . 81, 82, 83
Gaussen *v.* Whatman, (1905) 93 L. T. 101 7
Gee *v.* Liddell, (1866) 35 Beav. 631 16
Gent *v.* Harrison, (1859) Joh. 517 ; 5 Jur. N. S. 1285 ; 29 L. J. Ch. 68 ; 1 L. T. 128 ; 8 W. R. 57 29
Gerard, *Re*, (1893) 3 Ch. 252 ; 63 L. J. Ch. 23 ; 69 L. T. 393 79, 80, 82, 83
Gibbs *v.* Gibbs, (1872) 26 L. T. 865 . . . . 135, 154
Gibson *v.* Bott, (1802) 7 Ves. 89 ; 6 R. R. 87 . . 1, 140, 142
Giddings *v.* Giddings, (1827) 3 Russ. 241 ; 27 R. R. 78 . 88, 90
Gifford *v.* Fitzhardinge, (1899) 2 Ch. 32 ; 68 L. J. Ch. 529 ; 47 W. R. 618 . . . . . 99, 119, 120, 121
Gilliland *v.* Crawford, (1869) I. R. 4 Eq. 35 . . . 66, 68
Gjers, *Re*, (1899) 2 Ch. 54 ; 68 L. J. Ch. 442 ; 80 L. T. 689 ; 47 W. R. 535 . . . . . 52, 53, 58

PAGE
Glengall *v.* Barnard, (1842) 5 Beav. 245 157
Godden, *Re*, (1893) 1 Ch. 292; 62 L. J. Ch. 469; 68 L. T. 116; 41 W. R. 282. . . . . 129, 147, 155
Godley, *Re*, (1896) 1 I. R. 45. . . . . 119, 120
Goodall, *Re*, (1909) 1 Ch. 440; 78 L. J. Ch. 241; 100 L. T. 223. 8
Goodenough, *Re*, (1895) 2 Ch. 537; 65 L. J. Ch. 71; 73 L. T. 152; 44 W. R. 44 155
Goodenough *v.* Tremamondo, (1840) 2 Beav. 512 . . . 153
Gough *v.* Gough, (1891) 2 Q. B. 665; 65 L. T. 110; 39 W. R. 593. 116
Gordon *v.* Gordon (1906). *See* Henry, *Re*.
Gore, *Re*, (1874) I. R. 9 Eq. 83 107
Gorely, *Ex p.*, (1864) 4 D. J. & S. 477 7
Gow *v.* Forster, (1884) 26 Ch. D. 672; 51 L. T. 394 . 15, 124
Gower *v.* Eyre, (1815) Coop. G. 156 26
Grabowski, *Re*, (1868) 6 Eq. 12; 37 L. J. Ch. 926 . . 124
Grant, *Re*, (1883) 52 L. J. Ch. 552; 48 L. T. 937; 31 W. R. 703. . . . . 111, 134
Grant *v.* Grant, (1865) 34 L. J. Ch. 641 97
Grant *v.* Mussett, (1860) 8 W. R. 330; 2 L. T. 133 . . 145
Gray *v.* Siggers, (1880) 15 Ch. D. 74; 49 L. J. Ch. 819; 29 W. R. 13 149
Greaves *v.* Smith, (1874) 22 W. R. 388; 29 L. T. 798; W. N. 1874, 18 . . . . . 145, 146
Green, *Re*, (1888) 40 Ch. D. 610; 58 L. J. Ch. 157; 60 L. T. 225; 37 W. R. 300 . . . . . 18, 114
Green *v.* Britten, (1863) 1 D. J. & S. 649; 16 L. T. 825; W. N. (1867) 217 148
Green *v.* Britten, (1872) 42 L. J. Ch. 187; 27 L. T. 811 138, 142
Greene *v.* Potter, (1843) 2 Y. & C. Ch. 517; 7 Jur. 736 . 17
Greenwood *v.* Evans, (1841) 4 Beav. 44. 90
Gregg *v.* Coates, (1856) 23 Beav. 33 58
Greisley *v.* Chesterfield, (1851) 13 Beav. 288 107
Greville-Nugent *v.* Mackenzie, (1900) A. C. 83; 69 L. J. P. C. 1; 81 L. T. 793 . . . . . 37, 38
Griffith, *Re*, (1879) 12 Ch. D. 655; 41 L. T. 540; 28 W. R. 28 . . . . . 21, 22
Griffith, *Re*, (1883) 49 L. T. 161 46
Griffiths *v.* Porter, (1858) 25 Beav. 236 131
Grissell *v.* Leathes (1893). *See* Bacon, *Re*.
Groves *v.* Wright, (1856) 2 K. & J. 347; 2 Jur. N. S. 277 . 9
Gurney, *Re*, (1907) 2 Ch. 496; 76 L. J. Ch. 609 . . . 82
Guthrie, *Re*, (1902) 1 Ch. 942 6

Hachett *v.* Pattle, (1821) 6 Madd. 4 23
Hall, *Re*, (1855) 1 Jur. N. S. 974 8
Halliwell *v.* Phillips, (1858) 4 Jur. N. S. 607; 6 W. R. 408 31, 32
Halsey *v.* Bruce (1905). *See* Bruce, *Re*.
Hamer *v.* Tilsley, (1859) Joh. 486; 29 L. J. Ch. 32; 1 L. T. 54; 8 W. R. 20 55
Hancock *v.* Despard (1901). *See* Despard, *Re*.

PAGE
Harrington, *Re*, (1906) 75 L. J. Ch. 460 ; 94 L. T. 623 . 81, 83
Harrington *v.* Atherton, (1864) 2 D. J. & S. 352 ; 4 N. R. 206 ; 10 Jur. N. S. 1088 . . . . . 154, 155
Harrington *v.* Peat (1906). *See* Harrington, *Re*.
Harris *v.* Harris, (1862) 10 W. R. 826 66
Harris *v.* Harris, (1863) 32 Beav. 333 ; 7 L. T. 58 ; 11 W. R. 451 . . . . . 89, 90
Harris *v.* Poyner, (1852) 1 Dr. 174 ; 21 L. J. Ch. 915 ; 16 Jur. 880 . . . . . 58, 150, 152, 153
Harrison, *Re*, (1884) 28 Ch. D. 220 ; 54 L. J. Ch. 617 ; 52 L. T. 204 ; 33 W. R. 240 . . . . . 25, 27, 28
Harrison, *Re*, (1889) 43 Ch. D. 55 ; 59 L. J. Ch. 169 ; 61 L. T. 762 ; 38 W. R. 265 111
Harrison *v.* Barney (1894). *See* Barney, *Re*.
Harrison *v.* Harrison (1884). *See* Harrison, *Re*.
Hart *v.* Stone (1896). *See* Hubbuck, *Re*.
Hartley *v.* Pendarves, (1901) 2 Ch. 498 ; 70 L. J. Ch. 745 ; 85 L. T. 64 ; 50 W. R. 56 30
Harvey, *Re*, (1896) 1 Ch. 137 ; 65 L. J. Ch. 370 ; 44 W. R. 242 . . . . . 118, 119, 120
Harvey *v.* Harvey, (1842) 5 Beav. 134 145
Harvey *v.* Hobday (1895). *See* Harvey, *Re*.
Harvey *v.* Olliver, (1887) W. N. 149 97
Hastings' Claim (1870). *See* Bubb *v.* Yelverton.
Havelock *v.* Havelock, (1881) 17 Ch. D. 807 ; 50 L. J. Ch. 778 ; 44 L. T. 168 ; 29 W. R. 859 17
Hawes *v.* Curtis (1885). *See* Curtis, *Re*.
Hawkins *v.* Hawkins, (1836) 6 L. J. Ch. 69 107
Hay *v.* Wolmer (1895). *See* Cleveland, *Re*.
Hayward *v.* Pile, (1870) 5 Ch. 214 ; 22 L. T. 893 ; 18 W. R. 556 . . . . . 2, 93
Heathcote, *Re*, (1904) 1 Ch. 826 ; 73 L. J. Ch. 543 ; 90 L. T. 505 . . . . . 17, 19, 114, 115
Heathcote *v.* Trench (1904). *See* Heathcote, *Re*.
Hebert *v.* Bateman, (1853) 1 W. R. 191 10
Hellard *v.* Moody (1885). *See* Ridge, *Re*.
Heneage *v.* Andover, (1829) 3 Y. & J. 360 ; 10 Price, 316 . 114
Hengler, *Re*, (1893) 1 Ch. 586 ; 62 L. J. Ch. 383 ; 68 L. T. 84 ; 41 W. R. 491 . . . . . 52, 125
Henry, *Re*, (1907) 1 Ch. 30 ; 76 L. J. Ch. 74 ; 95 L. T. 776 . 134
Hewitt *v.* Morris, (1824) T. & R. 241 ; 2 L. J. O. S. Ch. 87 ; 24 R. R. 39 136
Hibbert *v.* Cooke, (1824) 1 Sim. & St. 552 ; 24 R. R. 225 . 43, 55, 68
Higginbotham *v.* Hawkins, (1872) 7 Ch. 676 ; 41 L. J. Ch. 828 ; 27 L. T. 328 ; 20 W. R. 955 36
Hill, *Re*, (1881) 50 L. J. Ch. 551 ; 45 L. T. 126 10
Hill *v.* Browne, (1844) Dru. 426 ; 6 Ir. Eq. Rep. 403 . 6, 108, 118
Hill *v.* Hill (1881). *See* Hill, *Re*.
Hill *v.* Maurice, (1847) 16 L. J. Ch. 280 ; 9 L. T. O. S. 71 . 55
Hilliard, *Re*, (1878) 38 L. T. 93 72
Hind *v.* Selby, (1856) 22 Beav. 373 149

PAGE
Hinves *v.* Hinves, (1844) 3 Ha. 609 . . 137, 144, 150, 153
Hobson, *Re,* (1885) 55 L. J. Ch. 422 ; 53 L. T. 627 ; 34 W. R. 70 . . . . . 154, 155
Hodgens, *Ex p.*, (1847) 11 Ir. Eq. Rep. 99 11
Hodges *v.* Tattersfield, (1886) 2 T. L. R. 832 59
Hodgson *v.* Bates (1906). *See* Bates, *Re.*
Holden, *Re,* (1888) 57 L. J. Ch. 648 ; 59 L. T. 358 . . 145
Holden *v.* Smith (1888). *See* Holden, *Re.*
Holgate *v.* Jennings, (1857) 24 Beav. 623 . 132, 148, 152, 157
Holland *v.* Hughes, (1809) 16 Ves. 111 ; 3 Mer. 685 . . 157
Hollier *v.* Burne, (1873) 16 Eq. 163 ; 42 L. J. Ch. 789 ; 28 L. T. 531 ; 21 W. R. 805 . . . . . 2, 93
Hollingsworth *v.* Davy (1907). *See* Davy, *Re.*
Hollis *v.* Allan, (1866) 14 W. R. 980 ; 12 Jur. N. S. 638 ; W. N. 1866, 291 11
Honywood *v.* Honywood, (1874) 18 Eq. 306 ; 43 L. J. Ch. 652 ; 30 L. T. 671 ; 22 W. R. 749 . . 25, 26, 27, 28, 30, 33
Honywood *v.* Honywood, (1902) 1 Ch. 347 ; 71 L. J. Ch. 174 ; 86 L. T. 214 . . . . . 109, 110
Hood *v.* Clapham, (1854) 19 Beav. 90 ; 1 Jur. N. S. 78 ; 24 L. J. Ch. 193 ; 24 L. T. O. S. 206 ; 3 W. R. 78 . 138, 143, 144, 145, 152
Hooper *v.* Rossiter, (1824) 13 Price, 774 ; McClel. 527 . . 12
Hope *v.* D'Hédouville, (1893) 2 Ch. 361 ; 62 L. J. Ch. 589 ; 68 L. T. 516 ; 41 W. R. 330 3
Hope *v.* Hope, (1855) 1 Jur. N. S. 770 2
Hopkins, *Re,* (1874) 18 Eq. 696 ; 43 L. J. Ch. 722 ; 30 L. T. 627 ; 22 W. R. 687 10
Horlock *v.* Smith, (1853) 17 Beav. 572 ; 23 L. J. Ch. 962 ; 22 L. T. O. S. 232 ; 2 W. R. 117 . . . . . 66, 97
Horn *v.* Coleman, (1857) 26 L. J. Ch. 544 ; 29 L. T. O. S. 18 ; 5 W. R. 409 99
Hotchkin, *Re,* (1887) 35 Ch. D. 41 ; 56 L. J. Ch. 445 ; 56 L. T. 244 ; 35 W. R. 463 . . . . . 84, 87
Hotchkys, *Re,* (1886) 32 Ch. D. 408 ; 55 L. J. Ch. 546 ; 55 L. T. 110 ; 34 W. R. 569 . . . . . 55, 56, 110
Hotham, *Re,* (1871) 12 Eq. 76 69
Houghton, *Re,* (1885) 30 Ch. D. 102 ; 55 L. J. Ch. 37 ; 53 L. T. 196 ; 33 W. R. 869 . . . . . 80, 81
House *v.* Way, (1848) 12 Jur. 958 ; 18 L. J. Ch. 22 ; 12 L. T. O. S. 268 152
Howard, *Re,* (1892) 2 Ch. 233 ; 61 L. J. Ch. 311 ; 67 L. T. 156 ; 40 W. R. 360 117
Howard *v.* Kay, (1858) 6 W. R. 361 ; 27 L. J. Ch. 448 . . 145
Howe, *Re,* (1903) 2 Ch. 69 ; 72 L. J. Ch. 461 ; 88 L. T. 438 ; 51 W. R. 468 112
Howe *v.* Dartmouth, (1802) 7 Ves. 137 ; 6 R. R. 96 . 1, 2, 137, 138, 139, 153, 154
Howe *v.* Howe, (1849) 14 Jur. 359 ; 14 L. T. O. S. 290 . 151, 153
Howe *v.* Kingscote (1903). *See* Howe, *Re.*
Howlin *v.* Sheppard, (1870) I. R. 6 Eq. 38, 253, 497 . 108, 118
Hubbard *v.* Young, (1847) 10 Beav. 203 ; 11 Jur. 177 ; 9 L. T. O. S. 263 152

PAGE
Hubbuck, *Re*, (1896) 1 Ch. 754 ; 65 L. J. Ch. 271 ; 73 L. T. 738 ; 44 W. R. 289 . . . . . 126, 129
Hubert *v.* Fetherstone, (1720) 1 P. Wms. 648 . . . 49
Hudleston *v.* Whelpdale, (1852) 9 Ha. 775 . . . 88, 90, 91
Hulkes *v.* Barrow, (1829) Taml. 264 91
Hume *v.* Richardson, (1862) 8 Jur. N. S. 686 . . . 97
Hume *v.* Richardson, (1862) 4 D. F. & J. 29 ; 8 Jur. N. S. 686 ; 31 L. J. Ch. 713 ; 6 L. T. 624 ; 10 W. R. 528 . 137, 139, 140
Humphreys, *Re*, (1893) 3 Ch. 1 ; 62 L. J. Ch. 498 ; 68 L. T. 729 ; 41 W. R. 519 . . . . . 17, 136
Humphreys *v.* Levett (1893). *See* Humphreys, *Re*.
Hungerford, *Re*, (1855) 1 Jur. N. S. 845 5
Hunloke, *Re*, (1902) 1 Ch. 941 ; 71 L. J. Ch. 530 ; 86 L. T. 829 6
Hunt, *Re*, (1900) W. N. 65 99
Hunt *v.* Parry (1886). *See* Alford, *Re*.
Hunt *v.* Scott, (1847) 1 De G. & S. 219 145
Hussey *v.* Hussey, (1820) 5 Madd. 44 ; 21 R. R. 275 . . 30

Ibbotson *v.* Elam, (1865) 1 Eq. 188 ; 12 Jur. N. S. 114 ; 14 W. R. 241 . . . . . 15, 19, 150
Ingram, *Re*, (1854) 2 W. R. 679 98
Ingram, *Re*, (1863) 11 W. R. 980 24
Innes *v.* Mitchell, (1846) 1 Ph. 710 ; 2 Ph. 346 . . . 128
Irving *v.* Houstoun, (1803) 4 Paton Sc. App. 521 . . . 11
Isaac *v.* Wall, (1877) 6 Ch. D. 706 ; 46 L. J. Ch. 576 ; 37 L. T. 227 ; 25 W. R. 844 . . . . . 89, 90, 93, 95
Ivy *v.* Gilbert, (1722) 2 P. Wms. 13 ; 6 Bro. P. C. 68 . . 113

Jackson *v.* Jackson, (1869) 17 W. R. 547 ; 20 L. T. 354 140, 154
Jacques *v.* Chambers, (1846) 4 Railw. Cas. 499 . . . 121
James *v.* Gammon, (1846) 15 L. J. Ch. 217 . . . 138, 144
Jameson *v.* Stein, (1855) 21 Beav. 5 120
Jebb *v.* Tugwell, (1855) 20 Beav. 84 ; 24 L. J. Ch. 433 ; 3 W. R. 278 150
Jeffreys *v.* Conner, (1860) 28 Beav. 328 44
Jesse *v.* Lloyd, (1883) 48 L. T. 656 69
Jeune *v.* Baring (1892). *See* Baring, *Re*.
Jodrell *v.* Jodrell, (1869) 20 L. T. 349 30
Johns *v.* Carden (1900). *See* Copland, *Re*.
Johnson, *Re*, (1869) 8 Eq. 348 70
Johnson *v.* Johnson, (1846) 2 Coll. 441 ; 10 Jur. 279 ; 7 L. T. O. S. 3 . . . . . 138, 139
Johnson *v.* Johnson, (1850) 15 Jur. 714 ; 16 L. T. O. S. 455 10
Johnson *v.* Lawson (1879). *See* Burn, *Re*.
Johnson *v.* Routh, (1857) 27 L. J. Ch. 305 ; 6 W. R. 6 140, 154, 155
Johnston *v.* Moore, (1858) 27 L. J. Ch. 453 ; 4 Jur. N. S. 356 ; 6 W. R. 490 147
Joliffe *v.* Twyford, (1858) 26 Beav. 227 ; 4 Jur. N. S. 1165 ; 32 L. T. O. S. 141 68

PAGE
Jones, *Re*, (1855) 1 Jur. N. S. 817 35
Jones, *Re*, (1884) 26 Ch. D. 736; 53 L. J. Ch. 807; 50 L. T. 466; 32 W. R. 735 100
Jones *v.* Bennett (1896). *See* Bennett, *Re*.
Jones *v.* Jones, (1846) 5 Ha. 440; 10 Jur. 516; 7 L. T. O. S. 157 . . . . . 88, 89, 90, 91, 92
Jones *v.* Mason (1888). *See* Muffett, *Re*.
Jones *v.* Morgan, (1783) 1 Bro. C. C. 205 119
Jones *v.* Ogle, (1872) 8 Ch. 192; 42 L. J. Ch. 334; 28 L. T. 245; 21 W. R. 236 . . . . . 23, 24

Keir *v.* Robins, (1838) 2 Jur. 773 92
Kekewich *v.* Marker, (1851) 3 Mac. & G. 311; 21 L. J. Ch. 182; 17 L. T. O. S. 193; 15 Jur. 687 . . 35, 106, 115
Kemeys Tynte, *Re*, (1892) 2 Ch. 211; 61 L. J. Ch. 377; 66 L. T. 752; 40 W. R. 423 39
Kemeys Tynte *v.* Kemeys Tynte (1892). *See* Kemeys Tynte, *Re*.
Kemmis *v.* Kemmis, (1884) 13 L. R. Ir. 372 17
Kennedy *v.* Daly, (1858) 7 Ir. Ch. R. 445 . . . 109, 110
Kensington, *Re*, (1905) 21 Times L. R. 351 . . . 81, 82, 83
Kensington *v.* Bouverie, (1859) 7 H. L. C. 557; 29 L. J. Ch. 537; 6 Jur. N. S. 105; 34 L. T. O. S. 16 107, 108, 109, 119
Ker, *Re*, (1908) 1 I. R. 293 8
Kilvington *v.* Gray, (1825) 2 Sim. & St. 396; 4 L. J. O. S. Ch. 80 137
Kilworth *v.* Mountcashell, (1864) 12 Ir. Ch. R. 43; 15 Ir. Ch. R. 565 . . . . . 108, 110
Kilworth *v.* Mountcashell, (1864) 15 Ir. Ch. 565 . . . 108
Kingham *v.* Kingham, (1897) 1 I. R. 170 . . 51, 52, 53, 58
Kingham *v.* Lee, (1846) 15 Sim. 396; 16 L. J. Ch. 49; 8 L. T. O. S. 359; 11 Jur. 4 59
Kinnaird *v.* Freake (1901). *See* Freake, *Re*.
Kinnersley *v.* Williamson, (1870) 39 L. J. Ch. 788; 23 L. T. 39; W. N. 1870, 190 59
Kinnoul *v.* Money, (1767) 3 Sw. 202 n. . . . 106, 108
Kirkman *v.* Booth, (1848) 11 Beav. 273; 18 L. J. Ch. 25; 13 L. T. O. S. 482 . . . . . 138, 152
Kirwan *v.* Kennedy, (1869) I. R. 3 Eq. 472 . . . 107, 108
Kirwan *v.* Kennedy, (1870) I. R. 4 Eq. 499 109
Knatchbull, *Re*, (1885) 29 Ch. D. 588; 54 L. J. Ch. 1168; 53 L. T. 284; 33 W. R. 569 . . . . . 115, 117
Knebworth, *Re* (1888). *See* Lytton, *Re*.
Knowles, *Re*, (1868) 18 L. T. 809 97

Laing, *Re*, (1866), 1 Eq. 416; 12 Jur. N. S. 119; 35 L. J. Ch. 282; 14 L. T. 56; 14 W. R. 328 3
Lambert *v.* Lambert, (1872) 20 W. R. 943; 27 L. T. 59 . 148
Lambert *v.* Lambert, (1873) 16 Eq. 320; 43 L. J. Ch. 106; 21 W. R. 748 132
Lambert *v.* Lambert, (1874) 22 W. R. 359; 29 L. T. 878 . 23

PAGE
Lambert *v.* Rendle, (1863) 3 N. R. 247 141
Lancefield *v.* Iggulden, (1874) L. R. 10 Ch. 136 ; 44 L. J. Ch. 203; 31 L. T. 813; 23 W. R. 223 1
Lane *v.* Brown, (1871) 25 L. T. 152 . . . . 149, 156
Langmead *v.* Cockerton, (1877) 25 W. R. 315 . . . 46
Lansdowne *v.* Lansdowne, (1815) 1 Madd. 116; 15 R. R. 225 . . . . . 32, 33
Lansdowne *v.* Lansdowne, (1820) 1 J. & W. 522; 15 R. R. 225 54
La Terriere *v.* Bulmer, (1827) 2 Sim. 18 . . 136, 137, 140
Lawrence, *Re* (1884). *See* Lawrence *v.* Lawrence.
Lawrence *v.* Lawrence, (1884) 26 Ch. D. 795 ; 53 L. J. Ch. 982 ; 50 L. T. 715 ; 32 W. R. 791 . . . . 21, 100
Lawrence *v.* Maggs, (1759) 1 Eden. 453 . . . 88, 89
Leadbitter, *Re*, (1881) 30 W. R. 378 72
Lean *v.* Lean, (1875) 32 L. T. 305 ; W. N. 1875, 77 ; 23 W. R. 484 147
Learoyd *v.* Whiteley, (1887) 12 App. Cas. 727 ; 57 L. J. Ch. 390 ; 58 L. T. 93 ; 36 W. R. 721 130
Leconfield, *Re*, (1907) 2 Ch. 340 ; 76 L. J. Ch. 562 ; 97 L. T. 163 . . . . . 80, 81
Lee *v.* Alston, (1779) 1 Bro. C. C. 194 25
Lee *v.* Alston, (1789) 3 Bro. C. C. 38 ; 1 Ves. Jun. 78 . 28, 29
Leeds *v.* Amherst, (1846) 2 Ph. 117 36
Leeds *v.* Amherst, (1850) 20 Beav. 239 36
Lefroy *v.* Egmont (1908). *See* Egmont, *Re*.
Legge *v.* Legge (1863). *See* Bagot *v.* Bagot.
Legh, *Re*, (1902) 2 Ch. 274 ; 71 L. J. Ch. 668 ; 86 L. T. 884 ; 50 W. R. 570 . . . . . 64, 68, 83, 86
Leigh, *Re*, (1871) 6 Ch. 887 ; 40 L. J. Ch. 687 ; 25 L. T. 644 ; 19 W. R. 1105 . . . . . 54, 60, 70, 71
Leighton *v.* Leighton (1896). *See* De Tabley, *Re*.
Leinster, *Re*, (1889) 23 L. R. Ir. 152 118
Leonard, *Re*, (1881) 29 W. R. 234 ; 43 L. T. 664 . . . 149
Leslie, *Re*, (1876) 2 Ch. D. 185 ; 45 L. J. Ch. 668; 34 L. T. 239 ; 24 W. R. 546 69
Lever, *Re*, (1897) 1 Ch. 32 ; 66 L. J. Ch. 66 ; 75 L. T. 383 ; 45 W. R. 172 63
Leveson Gower, *Re*, (1905) 2 Ch. 95 ; 74 L. J. Ch. 540 ; 92 L. T. 836 ; 53 W. R. 524 . . . . 80, 82, 83, 104
Lewis, *Re*, (1907) 2 Ch. 296 ; 76 L. J. Ch. 539 ; 97 L. T. 636 5, 21
Lichfield *v.* Baker, (1840) 2 Beav. 481 ; 13 Beav. 447 ; 9 L. J. Ch. 291 . . . . . 138, 143, 144
Lindsay *v.* Wicklow, (1871) I. R. 6 Eq. 72 107
Lindsay *v.* Wicklow, (1873) I. R. 7 Eq. 192 . . . 118, 120
Lingard, *Re*, (1908) W. N. 107 42
Lingard *v.* Squirrell (1908). *See* Lingard, *Re*.
Lisburne, *Re*, (1901) W. N. 91 . . . . . 79, 80
Littlewood *v.* Pattison, (1864) 10 Jur. N. S. 875 . . . 45
Llewellin, *Re*, (1887) 37 Ch. D. 317 ; 57 L. J. Ch. 316; 58 L. T. 152; 36 W. R. 347 . . . . 25, 27, 34, 104
Llewellin *v.* Williams (1887). *See* Llewellin, *Re*.
Llewellyn, *Re*, (1861) 29 Beav. 171 . . 138, 141, 149, 150

PAGE
Lloyd, *Re*, (1903) 1 I. R. 144. 120
Lloyd *v.* Carr (1890). *See* Foster, *Re*.
Lock *v.* Venables, (1859) 27 Beav. 598 24
Lock *v.* Willis (1887). *See* Bradbrook, *Re*.
Lofthouse *v.* Haggard (1904). *See* Bullock, *Re*.
Londesborough *v.* Somerville, (1854) 19 Beav. 295; 23 L. J. Ch. 646; 23 L. T. O. S. 291 . . . . 50, 113
Long, *Re*, (1853) 1 W. R. 226; 20 L. T. O. S. 305 . . 45
Long *v.* Harris, (1855) 24 L. T. O. S. 297; 1 Jur. N. S. 913. 107
Longuet *v.* Hockley, (1870) 22 L. T. 198 99
Lonsdale *v.* Berchtoldt, (1857) 3 K. & J. 185; 3 Jur. N. S. 328 . . . . . 43, 51, 52, 57, 125
Lonsdale *v.* Crawfurd (1900). *See* Lonsdale *v.* Lowther.
Lonsdale *v.* Lowther, (1900) 2 Ch. 687; 69 L. J. Ch. 686; 83 L. T. 312; 16 T. L. R. 509 39
Lord *v.* Godfrey, (1819) 4 Madd. 455 1
Lovat *v.* Leeds, (1862) 2 Dr. & S. 75; 6 L. T. 307; 10 W. R. 398. 31
Lovat *v.* Leeds, (1864) 11 L. T. 442 103
Lovelace *v.* Anson (1907). *See* Anson, *Re*.
Lowndes *v.* Norton, (1864) 33 L. J. Ch. 583; 11 L. T. 290 25, 35
Lowndes *v.* Norton, (1877) 6 Ch. D. 139; 46 L. J. Ch. 613; 25 W. R. 826 29
Lushington *v.* Boldero, (1819) 6 Madd. 149; 22 R. R. 261 . 32
Lushington *v.* Boldero, (1851) 15 Beav. 1; 16 Jur. 140; 21 L. J. Ch. 49; 18 L. T. O. S. 151 33
Lygon *v.* Beauchamp, (1832) 6 L. J. Ch. 158 30
Lynch-Blosse, *Re*, (1899) W. N. 27 . . . 140, 142, 147
Lyon *v.* Mitchell, (1899) W. N. 27 . . . . 126, 130
Lyons *v.* Harris, (1907) 1 I. R. 32. . . . . 138, 142
Lysaght, *Re*, (1898) 1 Ch. 115; 67 L. J. Ch. 65; 77 L. T. 637 22, 24
Lysaght *v.* Lysaght, (1851) 4 Ir. Jur. 110 118
Lysaght *v.* Lysaght (1897). *See* Lysaght, *Re*.
Lytton, *Re*, (1888) 38 Ch. D. 20; 57 L. J. Ch. 340; 59 L. T. 12; 36 W. R. 420 85

McClure, *Re*, (1906) 76 L. J. Ch. 52; 95 L. T. 704; (1906) W. N. 200 . . . . . 97, 104
Macdonald *v.* Irvine, (1878) 8 Ch. D. 101; 47 L. J. Ch. 494; 38 L. T. 155; 26 W. R. 381 . . . 16, 121, 137, 138, 144
Mackie *v.* Mackie, (1845) 5 Ha. 70; 9 Jur. 753 . . 146, 156
Maclaren *v.* Stainton, (1861) 3 D. F. & J. 202; 30 L. J. Ch. 723; 7 Jur. N. S. 691; 9 W. R. 908 11
Maclaren *v.* Stainton, (1870) 11 Eq. 382 133
Macnolty *v.* Fitzherbert, (1857) 27 L. J. Ch. 272; 30 L. T. O. S. 125; 3 Jur. N. S. 1237 . . . . . 54, 55
Macpherson *v.* Macpherson, (1852) 1 Macq. 243; 16 Jur. 847; 19 L. T. O. S. 221 . . . . . 136, 140
Maddy *v.* Hale, (1876) 3 Ch. D. 327; 45 L. J. Ch. 791; 35 L. T. 134; 24 W. R. 1005 . . . . . 2, 19, 43
Makings *v.* Makings, (1860) 1 D. F. & J. 355 . . 108, 110

PAGE
Malam, *Re*, (1894) 3 Ch. 578 ; 63 L. J. Ch. 797 ; 71 L. T. 655 12, 13, 14
Malam *v.* Hitchens (1894). *See* Malam, *Re*.
Mansel *v.* Norton, (1883) 22 Ch. D. 769 ; 52 L. J. Ch. 357 ; 48 L. T. 654; 31 W. R. 325 115
Marker *v.* Kekewich, (1850) 8 Ha. 291 ; 19 L. J. Ch. 492 113, 114
Marker *v.* Marker, (1851) 9 Ha. 1 ; 15 Jur. 663 ; 20 L. J. Ch. 246; 17 L. T. O. S. 176 32
Marland *v.* Williams (1895). *See* Goodenough, *Re*.
Marlborough, *Re*, (1886) 32 Ch. D. 1 ; 55 L. J. Ch. 339 ; 53 L. T. 216 48
Marlborough, *Re*, (1892) 8 Times L. R. 201 80
Marlborough Estate Act, *Re*, (1850) 15 L. T. O. S. 341 . . 44
Marlborough *v.* Marjoribanks (1886). *See* Marlborough, *Re*.
Marner, *Re*, (1866) 3 Eq. 432 ; 12 Jur. N. S. 959 ; 36 L. J. Ch. 58 ; 15 L. T. 237 ; 15 W. R. 99 98
Marsh *v.* Marsh, (1856) 2 Jur. N. S. 348 114
Marsh *v.* Wells, (1824) 2 Sim. & St. 87 ; 2 L. J. O. S. Ch. 191 ; 25 R. R. 160 57
Marshall *v.* Bremner, (1854) 2 Sm. & G. 237 ; 2 W. R. 320 . 150
Marshall *v.* Crowther, (1874) 2 Ch. D. 199 ; 23 W. R. 210 . 107
Marshall *v.* Holloway, (1818) 2 Sw. 432 ; 19 R. R. 94 . . 18
Marshall *v.* Holloway, (1832) 5 Sim. 196 ; 35 R. R. 848 . 67
Martin *v.* Martin, (1898) 1 I. R. 112 115
Maryon-Wilson, *Re*, (1901) 1 Ch. 934 ; 70 L. J. Ch. 500; 84 L. T. 708 104
Mason *v.* Hulke, (1874) 22 W. R. 622 93
Massy *v.* Gahan, (1889) 23 L. R. Ir. 518 134
Matheson *v.* Goodwyn (1890). *See* Flower, *Re*.
Matheson *v.* Taylor (1905). *See* Taylor, *Re*.
Mathias *v.* Mathias, (1858) 3 Sm. & G. 552 ; 4 Jur. N. S. 780 ; 32 L. T. 25 66
Maynard, *Re*, (1899) 2 Ch. 347 ; 68 L. J. Ch. 609 ; 81 L. T. 163; 48 W. R. 60 . . . . . 37, 38, 40
Maynard *v.* Gibson, (1876) W. N. 204 9
Medows, *Re*, (1898) 1 Ch. 300 ; 67 L. J. Ch. 145 ; 78 L. T. 13 ; 46 W. R. 297 8
Mehrtens *v.* Andrews, (1839) 3 Beav. 72 . . 140, 142, 143
Melward, *Ex p.*, (1859) 27 Beav. 571 ; 29 L. J. Ch. 245 . . 70
Meredith, *Re*, (1898) 67 L. J. Ch. 409 ; 78 L. T. 492 ; (1898) W. N. 48 24
Metcalfe *v.* Hutchinson, (1875) 1 Ch. D. 591 ; 45 L. J. Ch. 210 113
Mette, *Re*, (1868) 7 Eq. 72 ; 38 L. J. Ch. 445 46
Meyer *v.* Simonsen, (1852) 5 De G. & S. 723 ; 21 L. J. Ch. 678 ; 19 L. T. O. S. 337 . . . . . 138, 141
Micklethwait *v.* Micklethwait, (1857) 1 De G. & J. 504 ; 3 Jur. N. S. 1279 ; 26 L. J. Ch. 721 ; 30 L. T. O. S. 5 ; 5 W. R. 861 . . . . . 32, 34
Midgley *v.* Crowther (1895). *See* Crowther, *Re*.
Mildmay *v.* Mildmay, (1792) 4 Bro. C. C. 76 . . . 30, 35
Milford *v.* Peile, (1854) 17 Beav. 602 2
Millard, *Re*, (1893) 3 Ch. 116 ; 62 L. J. Ch. 761 ; 69 L. T. 202 85, 86

PAGE
Miller *v.* Miller, (1872) 13 Eq. 263 ; 41 L. J. Ch. 291 ; 20 W. R. 324 38
Milles *v.* Milles, (1802) 6 Ves. 761 . . . . . 5, 91
Millichamp, *Re*, (1885) 52 L. T. 758 . . . . . 52, 125
Milliken *v.* Snelling (1886). *See* Colyer, *Re*.
Mills *v.* Mills, (1835) 7 Sim. 501 ; 4 L. J. Ch. 266 ; 40 R. R. 176. 146
Milltown *v.* Trench, (1837) 4 Cl. & F. 276 ; 11 Bli. N. R. 1 . 110
Milne *v.* Parker, (1848) 17 L. J. Ch. 194 ; 12 Jur. 171 . . 152
Milnes *v.* Slater, (1803) 8 Ves. 295 ; 7 R. R. 48 . . . 114
Milsintown *v.* Portmore, (1821) 3 Madd. 491 ; 5 Madd. 471 . 91
Mitchell *v.* Armstrong, (1901) 17 Times L. R. 495 . . 5
Mittam, *Re*, (1858) 4 Jur. N. S. 1077 . . . . 12, 14
Money, *Re*, (1862) 2 Dr. & Sm. 94 ; 31 L. J. Ch. 496 ; 10 W. R. 399. 44
Money *v.* Gibbs, (1837) 1 Dru. & Wal. 394 122
Montagu, *Re*, (1897) 2 Ch. 8 ; 66 L. J. Ch. 541 ; 76 L. T. 485 ; 45 W. R. 594 . . . . . 67, 68, 80
Montfort *v.* Cadogan, (1816) 17 Ves. 485 ; 19 Ves. 635 ; 2 Mer. 3 ; 13 R. R. 270 . . . . . 91, 92
Moore, *Re*, (1885) 54 L. J. Ch. 432 ; 52 L. T. 510 ; 33 W. R. 447 ; W. N. 1885, 17 . . . . . 126, 130
Moore *v.* Johnson (1885). *See* Moore, *Re*.
Moore *v.* Wilson (1907). *See* Wilson, *Re*.
More *v.* More, (1889) 37 W. R. 414 ; 60 L. T. 626 . . . 100
Morgan *v.* Morgan, (1850) 4 De G. & S. 164 ; 20 L. J. Ch. 109 ; 15 Jur. 319 ; 17 L. T. O. S. 302 135
Morgan *v.* Morgan, (1851) 14 Beav. 72 137, 138, 139, 144, 148, 150
Morley, *Re*, (1895) 2 Ch. 738 ; 64 L. J. Ch. 727 ; 73 L. T. 151 ; 44 W. R. 140 . . . . . 122, 155
Morley *v.* Haig (1895). *See* Morley, *Re*.
Morley *v.* Mendham, (1856) 2 Jur. N. S. 998 . . 146, 147
Morley *v.* Morley, (1855) 5 D. M. & G. 610 ; 1 Jur. N. S. 1097 ; 25 L. J. Ch. 1 ; 26 L. T. O. S. 99 ; 4 W. R. 75 118, 119, 120
Morres *v.* Hodges, (1860) 27 Beav. 625 ; 1 L. T. 425 . . 19
Morris *v.* Morris, (1847) 15 Sim. 505 ; 16 L. J. Ch. 201 ; 11 Jur. 178, 196 ; 9 L. T. O. S. 34 32
Moses, *Re*, (1908) 2 Ch. 235 ; 77 L. J. Ch. 783 ; 99 L. T. 519 157
Moses *v.* Valentine (1908). *See* Moses, *Re*.
Mousley *v.* Carr, (1841) 4 Beav. 49 15
Muffett, *Re*, (1888) 39 Ch. D. 534 ; 57 L. J. Ch. 1017 ; 59 L. T. 499 ; 37 W. R. 9 111
Mundy, *Re*, (1891) 1 Ch. 399 ; 60 L. J. Ch. 273 ; 64 L. T. 29 ; 39 W. R. 209 . . . . . 70, 81
Murray *v.* Glasse, (1853) 23 L. J. Ch. 126 ; 17 Jur. 816 ; 1 Eq. Rep. 541 . . . . . 10, 147
Myers *v.* Washbrook, (1901) 1 Q. B. 360 ; 70 L. J. K. B. 357 ; 83 L. T. 633 9

Nairn *v.* Marjoribanks, (1827) 3 Russ. 582 66
Napier *v.* Staples, (1859) 10 Ir. Ch. 344 . . . 154, 155
Navan *v.* Kingscourt R. Co., (1888) 21 L. R. Ir. 369 . . 117

PAGE
Nepean, *Re*, (1900) 1 I. R. 298 119
Neville *v.* Fortescue, (1848) 16 Sim. 333; 12 Jur. 908 . . 151
Newdigate *v.* Newdigate, (1834) 1 Sim. 131; 8 Bli. N. S. 734; 2 Cl. & F. 601; 5 L. J. Ch. 52; 37 R. R. 253 32, 34
Newen, *Re*, (1894) 2 Ch. 297; 70 L. T. 653; 43 W. R. 58 . 99
Newen *v.* Barnes (1894). *See* Newen, *Re*.
Newman, *Re*, (1874) 9 Ch. 681; 43 L. J. Ch. 702; 31 L. T. 265. . . . . 61, 71
Newton, *Re*, (1890) W. N. 24 81
Nicholson, *Re*, (1895) W. N. 106 142
Nicholson, *Re*, (1909) 2 Ch. 111; 78 L. J. Ch. 516; 100 L. T. 877. 149
Nicholson *v.* Nicholson, (1861) 30 L. J. Ch. 617; 9 W. R. 676. 15
Nicholson *v.* Nicholson (1895). *See* Nicholson, *Re*.
Nightingale *v.* Lawson, (1785) 1 Bro. C. C. 440 . . 88, 89, 90
Nixon *v.* Sheldon (1888). *See* Sheldon, *Re*.
Noble *v.* Cass, (1828) 2 Sim. 343; 29 R. R. 115 . . . 5, 6
Noel *v.* Henley, (1819) 7 Price, 241 3
Norfolk, *Re*, (1900) 1 Ch. 461; 69 L. J. Ch. 236; 82 L. T. 613; 48 W. R. 328. 86
Norfolk *v.* Herries (1900). *See* Norfolk, *Re*.
Norie *v.* Bennett (1898). *See* Medows, *Re*.
Norrington, *Re*, (1879) 13 Ch. D. 654; 28 W. R. 711 . . 147
Norris *v.* Harrison, (1817) 2 Madd. 268 6
North, *Re*, (1868) 19 L. T. 43; W. N. 1868, 148 . . . 45
North, *Re*, (1909) 1 Ch. 625; 78 L. J. Ch. 345 . . . 38
Northage, *Re*, (1891) 60 L. J. Ch. 488; 64 L. T. 625; (1891) W. N. 84 . . . . . 12, 14
North Western R. Co., *Re* (1870). *See* Sewell, *Re*.
Norton *v.* Johnstone, (1885) 30 Ch. D. 649; 55 L. J. Ch. 222; 34 W. R. 13 . . . . . 18, 114

Oakes *v.* Strachey, (1843) 13 Sim. 414; 7 Jur. 433 . . 153
O'Brien *v.* O'Brien, (1751) Amb. 107 32
Offen *v.* Reeve, (1854) 24 L. T. O. S. 172 . . . 138, 141
Oldham, *Re*, (1871) W. N. 190 102
Oliver, *Re*, (1908) 2 Ch. 74; 77 L. J. Ch. 547; 99 L. T. 241. 3
O'Neill *v.* Lucas, (1838) 2 Keen, 313 135
Oppenheimer, *Re*, (1907) 1 Ch. 399; 76 L. J. Ch. 287; 96 L. T. 631 . . . . . 22, 23, 24
Oppenheimer *v.* Boatman (1907). *See* Oppenheimer, *Re*.
Ormonde *v.* Kynnersley (1830). *See* Butler *v.* Kynnersley.
Ormrod, *Re*, (1892) 2 Ch. 318; 61 L. J. Ch. 651; 66 L. T. 845; 40 W. R. 490. . . . . 85, 101
Oxford, &c., R. Co., *Re* (1859). *See* Melward, *Ex p.*

Packington's Case, (1744) 3 Atk. 215; 1 Dick. 101 . . 32
Paget, *Re*, (1892) 9 Times L. R. 88 13
Parby, *Re*, (1857) 28 L. T. O. S. 72 97
Pardoe *v.* Pardoe, (1900) 82 L. T. 547 . . . 25, 33, 151

PAGE
Paris *v.* Paris, (1804) 10 Ves. 185; 7 R. R. 379 . . . 11
Parke *v.* Thackray, (1875) 24 W. R. 21 121
Parker-Jervis, *Re*, (1898) 2 Ch. 643; 67 L. J. Ch. 682; 79 L. T. 403; 47 W. R. 147 112
Parry & Hopkin, *Re*, (1900) 1 Ch. 160; 69 L. J. Ch. 190; 81 L. T. 807; 48 W. R. 345 . . . . . 57, 58
Parry *v.* Warrington, (1820) 6 Madd. 155; 22 R. R. 264 . 17
Partington, *Re*, (1862) 11 W. R. 160 71
Partington, *Re*, (1902) 1 Ch. 711; 71 L. J. Ch. 472; 86 L. T. 194; 50 W. R. 388 . . . . . 64 86
Parteriche *v.* Powlet, (1742) 2 Atk. 383 54
Partridge *v.* Pawlet, (1736) 1 Atk. 467 31
Patching *v.* Barnett, (1880) 43 L. T. 50 21
Pawley *v.* Colyer, (1863) 3 D. J. & S. 676 . . . 100, 110
Peacock *v.* Lucas (1894). *See* Whitehead, *Re*.
Pearce *v.* Bentham, (1906). *See* Bentham, *Re*.
Pearson, *Re*, (1873) 21 W. R. 401; 28 L. T. 57 . . . 67
Penfold *v.* Dixon (1901). *See* Dixon, *Re*.
Penrhyn *v.* Hughes, (1799) 5 Ves. 99 . . . 106, 108, 109
Perkins, *Re*, (1907) 2 Ch. 596; 77 L. J. Ch. 16; 97 L. T. 706 134
Perrins *v.* Bellamy, (1899) 1 Ch. 797; 68 L. J. Ch. 397; 80 L. T. 478; 47 W. R. 417 1
Perrot *v.* Perrot, (1744) 3 Atk. 94 25
Peterborough *v.* Mordaunt, (1763) 1 Eden. 474 . . . 106
Peters *v.* Blake, (1837) 6 L. J. Ch. 157 30
Pfleger, *Re*, (1868) 6 Eq. 426 45
Phillimore, *Re*, (1903) 1 Ch. 942; 72 L. J. Ch. 591; 88 L. T. 765 126
Phillimore *v.* Herbert, (1903). *See* Phillimore, *Re*.
Phillips, *Re*, (1868) 6 Eq. 250 45
Phillips, *Re*, (1880) 49 L. J. Ch. 198; 23 W. R. 340 . 135, 136
Phillips *v.* Barlow, (1844) 14 Sim. 263; 14 L. J. Ch. 35; 4 L. T. O. S. 130A 30
Phillips *v.* Beal, (1862) 32 Beav. 25 8
Phillips *v.* Levy (1880). *See* Phillips, *Re*.
Phillips *v.* Sarjent, (1848) 7 Ha. 33 42
Pickering *v.* Pickering, (1839) 4 My. & Cr. 289; 3 Jur. 743; 8 L. J. Ch. 336 . . . . . 1, 143, 144, 151
Pickup *v.* Atkinson, (1846) 4 Ha. 624; 10 Jur. 303; 15 L. J. Ch. 213 . . . . . 137, 138, 152, 153
Pidgeley *v.* Rawling, (1845) 2 Coll. 275 27
Pidgeon *v.* Spencer, (1867) 16 L. T. 83; W. N. 1867, 87 . 138
Piercy, *Re*, (1907) 1 Ch. 289; 76 L. J. Ch. 116; 95 L. T. 868 13, 147
Piers *v.* Piers, (1750) 1 Ves. Sen. 521 31
Pigot *v.* Bullock, (1792) 1 Ves. Jun. 479; 3 Bro. C. C. 539; 2 R. R. 148 . . . . . 27, 29, 34
Pigott *v.* Pigott, (1893) W. N. 115 157
Pinfold *v.* Shillingford, (1877) 46 L. J. Ch. 491; 25 W. R. 425; W. N. 1877, 56 . . . . . 3, 58, 59
Pitcairn, *Re*, (1896) 2 Ch. 199; 65 L. J. Ch. 120; 73 L. T. 430; 44 W. R. 200 . . . . . 149, 154, 156

PAGE
Pitt *v.* Pitt, (1856) 22 Beav. 294; 2 Jur. N. S. 1010; 27 L. T. O. S. 257 . . . . . 118, 119
Pizzi, *Re*, (1907) 1 Ch. 67; 76 L. J. Ch. 87; 95 L. T. 722 . 65, 101, 118
Playfair *v.* Cooper (1853). *See* Prince *v.* Cooper.
Playters *v.* Abbott, (1833) 2 My. & K. 97; 3 L. J. Ch. 57; 39 R. R. 148 . . . . . 91, 94
Plumbe *v.* Neild, (1860) 8 W. R. 337; 6 Jur. N. S. 529; 29 L. J. Ch. 618; 2 L. T. 417 10
Plumtre *v.* Oxenden, (1855) 25 L. J. Ch. 19; 1 Jur. N. S. 1037; 26 L. T. O. S. 55; 4 W. R. 29 . . . 91, 92
Plymouth *v.* Archer, (1782) 1 Bro. C. C. 159 . . 25, 35, 37
Poë *v.* Spencer Cooper (1907). *See* Spencer Cooper, *Re*.
Pole *v.* Pole, (1865) 2 Dr. & Sm. 420; 13 W. R. 648; 6 N. R. 19; 11 Jur. N. S. 477; 34 L. J. Ch. 586; 12 L. T. 337 44
Pollard *v.* Geake (1900). *See* Hunt, *Re*.
Pollock *v.* Pollock, (1874) 18 Eq. 329; 44 L. J. Ch. 168; 30 L. T. 779; 22 W. R. 724 . . . . . 21, 24
Poltimore *v.* Quicke, (1907). *See* Quicke, *Re*.
Pope, *Re*, (1901) 1 Ch. 64; 49 W. R. 122 136
Porter *v.* Baddeley, (1877) 5 Ch. D. 542 . . . 144, 148
Potts *v.* Potts, (1825) 3 L. J. O. S. Ch. 176; 26 R. R. 235 31, 32
Poulett *v.* Somerset, (1871) 19 W. R. 1048; 25 L. T. 56 . 69
Powell, *Re*, (1908) 1 I. R. 15 8
Powlett *v.* Bolton, (1797) 3 Ves. 374; 4 R. R. 21 . . 29
Powys *v.* Blagrave, (1854) Kay. 495; 4 D. M. & G. 448; 2 Eq. Rep. 395, 1204; 18 Jur. 462; 24 L. J. Ch. 142; 23 L. T. O. S. 37; 2 W. R. 700 . . . . . 54, 55, 101
Poynder, *Re*, (1881) 50 L. J. Ch. 753; 45 L. T. 403; 30 W. R. 7 72
Pratt *v.* Jenner, (1866) 14 W. R. 852; 12 Jur. N. S. 557 . 99
Prendergast *v.* Prendergast, (1850) 3 H. L. C. 195 . . 2
Preston *v.* Melville, (1845) 15 Sim. 35 138
Preston *v.* Melville, (1848) 16 Sim. 163 10
Price *v.* Anderson, (1847) 15 Sim. 473 10
Prince *v.* Cooper, (1853) 17 Beav. 187; 1 Eq. Rep. 137; 23 L. J. Ch. 343; 21 L. T. O. S. 177; 1 W. R. 376 . . 111

Quicke, *Re*, (1908) 1 Ch. 887; 77 L. J. Ch. 523; 98 L. T. 610; 24 T. L. R. 23 . . . . . 7, 53

Raby *v.* Ridehalgh, (1855) 7 D. M. & G. 104; 1 Jur. N. S. 363; 25 L. T. O. S. 19; 3 Eq. Rep. 901 . . . 131
Raffety *v.* King, (1836) 1 Keen, 601; 6 L. J. Ch. 87; 44 R. R. 126 106
Randall *v.* Russell, (1817) 3 Mer. 190; 17 R. R. 56 . 8, 138
Ratcliff, *Re*, (1898) 2 Ch. 352; 67 L. J. Ch. 562; 78 L. T. 834 97
Rawe *v.* Chichester, (1773) Amb. 715 88
Rayner *v.* Preston, (1881) 18 Ch. D. 1; 50 L. J. Ch. 472; 44 L. T. 787; 29 W. R. 547 6

PAGE

Redding, *Re*, (1897) 1 Ch. 876 ; 66 L. J. Ch. 460 ; 76 L. T. 339 ; 45 W. R. 457 . . . . . 51, 52, 57
Redington *v.* Redington, (1809) 1 B. & Be. 131 . . 118, 121
Reeves *v.* Creswick, (1839) 3 Y. & C. 715 . . 88, 90, 100
Reigh *v.* Kane (1902). *See* Partington, *Re*.
Revel *v.* Watkinson, (1748) 1 Ves. Sen. 93 . 106, 108, 109, 113
Reynolds *v.* Brown, (1852) 1 W. R. 50 145
Richardson, *Re*, (1900) 2 Ch. 778 ; 69 L. J. Ch. 804 . 19, 114, 115
Richardson *v.* Richardson (1900). *See* Richardson, *Re*.
Rickards *v.* Lynch Blosse (1899). *See* Lynch Blosse, *Re*.
Ridge, *Re*, (1885) 31 Ch. D. 504 ; 55 L. J. Ch. 265 ; 54 L. T. 549 ; 34 W. R. 159 . . . . . 25, 36, 38, 39, 40
Roberts, *Re*, (1908) 1 I. R. 222 8
Robinson, *Re*, (1891) 3 Ch. 129 ; 60 L. J. Ch. 776 ; 65 L. T. 244 ; 39 W. R. 632 . . . . . 41, 44, 46
Robinson *v.* Robinson, (1851) 1 D. M. & G. 247 ; 16 Jur. 255 ; 21 L. J. Ch. 111 ; 18 L. T. O. S. 293 . . 139, 140, 143
Rochester *v.* Le Fanu, (1906) 2 Ch. 513 ; 75 L. J. Ch. 743 ; 95 L. T. 602 65
Rodes, *Re*, (1909) 1 Ch. 815 ; 78 L. J. Ch. 434 ; 100 L. T. 959 6
Rogers, *Re*, (1860) 1 Dr. & Sm. 338 ; 6 Jur. N. S. 1363 ; 30 L. J. Ch. 153 ; 3 L. T. 397 ; 9 W. R. 64 . . . 19
Rolt *v.* Somerville, (1737) 2 Eq. Cas. Abr. 759 . . . 33
Rosher, *Re*, (1899) W. N. 134 . . . . . 47, 115
Rowe *v.* Rowe, (1861) 29 Beav. 276 145
Rowley *v.* Ginnever, (1897) 2 Ch. 503 ; 66 L. J. Ch. 669 ; 77 L. T. 302 . . . . . 66, 93
Rowley *v.* Unwin, (1855) 2 K. & J. 138 . . . 14, 121
Rowls *v.* Bebb, (1900) 2 Ch. 107 ; 69 L. J. Ch. 562 ; 82 L. T. 633 ; 48 W. R. 562 . . . . . 155, 156, 157
Ruddock *v.* Baker (1891). *See* Baker, *Re*.
Rutter *v.* Clapham (1886). *See* Clapham, *Re*.

Salt *v.* Locker (1898). *See* Parker-Jervis, *Re*.
Sanders *v.* Bromley (1886). *See* Bromley, *Re*.
Sanders *v.* Hobson (1909). *See* Rodes, *Re*.
Scholefield *v.* Lockwood, (1863) 12 W. R. 114 ; 3 N. R. 177 ; 9 Jur. N. S. 1258 ; 33 L. J. Ch. 106 ; 9 L. T. 400 . . 110
Scholefield *v.* Redfern, (1863) 2 Dr. & Sm. 173 ; 1 N. R. 465 ; 9 Jur. N. S. 485 ; 32 L. J. Ch. 627 ; 8 L. T. 487 ; 11 W. R. 453 . . . . . 49, 50, 134, 148
Scott, *Re*, (1902) 1 Ch. 918 ; 71 L. J. Ch. 475 ; 86 L. T. 348 ; 50 W. R. 454 . . . . . 17, 136
Scott *v.* Clifford (1901). *See* Clifford, *Re*.
Scott *v.* Scott (1902). *See* Scott, *Re*.
Scrivener *v.* Aldridge (1906). *See* Pizzi, *Re*.
Scrivener *v.* Smith, (1869) 8 Eq. 310 99
Seagram *v.* Knight, (1867) 2 Ch. 628 ; 36 L. J. Ch. 918 ; 17 L. T. 47 ; 15 W. R. 1152 . . . . . 28, 30, 36
Searancke, *Re*, (1896) 74 L. T. 339 16

PAGE
Searle, *Re*, (1900) 2 Ch. 829 ; 69 L. J. Ch. 712 ; 83 L. T. 364 ; 49 W. R. 44 . . . . . 3, 123
Searle *v.* Baker (1900). *See* Searle, *Re*.
Selby *v.* Selby, (1838) 2 Jur. 106 100
Sewell, *Re*, (1870) 11 Eq. 80 ; 40 L. J. Ch. 135 ; 23 L. T. 835 ; 19 W. R. 220 145
Shaftesbury *v.* Marlborough, (1833) 2 My. & K. 111 ; 3 L. J. Ch. 30 ; 39 R. R. 153 . . . . . 88, 90, 91
Sharp *v.* Marshall (1900). *See* Pope, *Re*.
Sharshaw *v.* Gibbs, (1854) Kay, 333 ; 18 Jur. 330 ; 23 L. J. Ch. 451 ; 23 L. T. O. S. 37 ; 2 Eq. Rep. 314 . . 55, 109
Sheldon, *Re*, (1888) 39 Ch. D. 50 ; 58 L. J. Ch. 25 ; 59 L. T. 133 ; 37 W. R. 26 148
Sheppard, *Re*, (1862) 7 L. T. 377 97
Sheppard *v.* Joynes, (1853) 2 W. R. 26 152
Sheppard *v.* Sheppard, (1863) 33 Beav. 129 105
Sherrard *v.* Harborough, (1753) Amb. 166 8
Shore *v.* Shore, (1859) 4 Dr. 501 ; 7 W. R. 390 ; 28 L. J. Ch. 940 . . . . . 97, 107, 123, 130
Shrewsbury *v.* Shrewsbury, (1790) 1 Ves. Jun. 227 ; 2 R. R. 101 118
Shrewsbury *v.* Shrewsbury, (1854) 18 Jur. 397 . . . 42
Simonds *v.* Huntington (1896). *See* Searancke, *Re*.
Simpson *v.* Bathurst, (1869) 5 Ch. 193 ; 23 L. T. 29 . . 5
Simpson *v.* Earles, (1847) 11 Jur. 921 . . . . 148, 151
Simpson *v.* Lester, (1858) 4 Jur. N. S. 1269 ; 33 L. T. O. S. 6 . 144, 149
Sitwell *v.* Bernard, (1801) 6 Ves. 520 ; 5 R. R. 374 . . 137
Skingley, *Re*, (1851) 3 Mac. & G. 221 ; 20 L. J. Ch. 142 . . 58
Skinner *v.* Todd, (1882) 46 L. T. 131 59
Skirving *v.* Williams, (1857) 24 Beav. 275 ; 3 Jur. N. S. 927 ; 30 L. T. O. S. 49 149
Slade *v.* Chaine, (1908) 1 Ch. 522 ; 77 L. J. Ch. 377 ; 98 L. T. 352 . . . . . 2, 9, 10, 143
Smith, *Re*, (1879) 48 L. J. Ch. 205 ; 40 L. T. 389 . . 138, 140
Smith, *Re*, (1891) 3 Ch. 65 ; 60 L. J. Ch. 613 ; 64 L. T. 821 ; 39 W. R. 590 104
Smith, *Re* (1894). *See* Smith *v.* Lancaster.
Smith, *Re*, (1901) 1 Ch. 689 ; 70 L. J. Ch. 273 . . 64, 118
Smith, *Re*, (1901) 84 L. T. 835 58
Smith, *Re*, (1906) 1 Ch. 799 ; 75 L. J. Ch. 442 ; 94 L. T. 643 ; 54 W. R. 449 51
Smith *v.* Claxton, (1819) 4 Madd. 484 133
Smith *v.* Dodsworth (1906). *See* Smith, *Re*.
Smith *v.* Dungannon, (1852) 3 Ir. Ch. Rep. 316 . . . 3
Smith *v.* Lancaster, (1894) 3 Ch. 439 ; 63 L. J. Ch. 842 ; 71 L. T. 511 ; 43 W. R. 17 104
Smith *v.* Pugh, (1842) 6 Jur. 701 138
Smythe *v.* Smythe, (1818) 2 Sw. 251 31
Solley *v.* Wood, (1861) 29 Beav. 482 ; 7 Jur. N. S. 1225 ; 30 L. J. Ch. 813 . . . . . 92, 124
Solomon *v.* Solomon, (1864) 10 L. T. 54 148
Sparling *v.* Parker, (1846) 9 Beav. 524 ; 10 Jur. 448 ; 7 L. T. O. S. 465 146

PAGE
Speer, *Re*, (1876) 3 Ch. D. 262 ; 24 W. R. 880 . . . 70
Spencer *v.* Scurr, (1862) 31 Beav. 334 ; 9 Jur. N. S. 9 ; 10 W. R. 878 . . . . . 37, 38
Spencer Cooper, *Re*, (1908) 1 Ch. 130 ; 77 L. J. Ch. 64 ; 98 L. T. 344 133
Stainer *v.* Hodgkinson, (1903) 52 W. R. 260 ; 23 L. J. Ch. 179 . . . . . 138, 145, 148, 153
Stamford, *Re*, (1887) 56 L. T. 484 84
Stamford, *Re*, (1889) 43 Ch. D. 84 ; 58 L. J. Ch. 849 ; 61 L. T. 504 ; 38 W. R. 317 104
Standing *v.* Gray, (1903) 1 I. R. 49 . . . . 82, 86
Stanford, *Re*, (1901). *See* Stanford *v.* Roberts.
Stanford *v.* Roberts, (1882) 52 L. J. Ch. 50 ; 48 L. T. 262 ; W. N. 1882, 146 101
Stanford *v.* Roberts, (1901) 1 Ch. 440 ; 70 L. J. Ch. 203 ; 83 L. T. 756 ; 49 W. R. 315 82
Staples, *Re*, (1849) 13 Jur. 273 98
Steward, *Re*, (1853) 1 Dr. 636 ; 1 W. R. 489 46
Stewart *v.* Kingsale, (1902) 1 I. R. 496 126
Stock, *Re*, (1880) 42 L. T. 46 71
Stone *v.* Meredith (1898). *See* Meredith, *Re*.
Stone *v.* Theed, (1787) 2 Bro. C. C. 243 ; 5 Ha. 451 n. . . 91
Stott *v.* Hollingworth, (1818) 3 Madd. 161 140
Stott *v.* Milne, (1884) 25 Ch. D. 710 ; 50 L. T. 742 . 96, 100, 101
Straker *v.* Wilson, (1871) 6 Ch. 503 ; 40 L. J. Ch. 630 ; 24 L. T. 763 ; 19 W. R. 761 . . . . . 15, 23, 149
Strathmore, *Re*, (1874) 18 Eq. 338 102
Stroud *v.* Gwyer, (1860) 28 Beav. 130 ; 6 Jur. N. S. 719 . 9, 10, 15, 49, 143, 149
Stuart *v.* Bruere, (1794) 6 Ves. 529 n. 137
Studdert, *Ex p.*, (1856) 6 Ir. Ch. Rep. 53 118
Sudbury & Poynton, *Re*, (1893) 3 Ch. 74 . . . 17, 84
Sudeley, *Re*, (1887) 37 Ch. D. 123 ; 57 L. J. Ch. 182 ; 58 L. T. 7 ; 36 W. R. 162 117
Sugden *v.* Alsbury (1890). *See* Alsbury, *Re*.
Sullivan *v.* Gurney (1907). *See* Gurney, *Re*.
Sutherland *v.* Cooke, (1844) 1 Coll. 498 ; 8 Jur. 1088 ; 14 L. J. Ch. 71 ; 4 L. T. O. S. 192 ; 5 L. T. O. S. 20 . 138, 142, 144, 152
Sutton *v.* Chaplin, (1804) 10 Ves. 66 65
Swinburn *v.* Ainslie (1885). *See* Ainslie, *Re*.
Syer *v.* Gladstone, (1885) 30 Ch. D. 614 110

Tardiff *v.* Robinson, (1819) 27 Beav. 629 n. 2
Taylor, *Re*, (1905) 1 Ch. 734 ; 74 L. J. Ch. 419 ; 92 L. T. 558 ; 53 W. R. 441 124
Taylor *v.* Chichester, &c. R. Co., (1870) L. R. 4 H. L. 628 ; 23 L. T. 657 44
Taylor *v.* Clark, (1841) 1 Ha. 161 ; 6 Jur. 76 ; 11 L. J. Ch. 189 . . . . . 138, 140, 147
Taylor *v.* Hibbert, (1820) 1 J. & W. 308 140

PAGE

Teague *v.* Fox (1893). *See* Godden, *Re.*
Tennant, *Re*, (1889) 60 L. T. 488 99
Tewart *v.* Lawson, (1874) 18 Eq. 490; 43 L. J. Ch. 673; 22 W. R. 822 . . . . . 18, 114
Theobald *v.* King (1881). *See* Leonard, *Re.*
Thomas, *Re*, (1891) 3 Ch. 482; 60 L. J. Ch. 781; 65 L. T. 142; 40 W. R. 75 . . . . . 147, 148, 149
Thomas, *Re*, (1900) 1 Ch. 319; 69 L. J. Ch. 198; 48 W. R. 409 . . . . . 59, 61, 64, 70, 80, 84, 85, 86
Thompson, *Re*, (1908) W. N. 195 134
Thompson *v.* Redding (1897). *See* Redding, *Re.*
Thompson *v.* Watkins (1908). *See* Thompson, *Re.*
Thornton *v.* Ellis, (1852) 15 Beav. 193; 21 L. J. Ch. 714; 19 L. T. O. S. 100 138
Thursby *v.* Thursby, (1875) 19 Eq. 395; 44 L. J. Ch. 289; 32 L. T. 187; 23 W. R. 500 . . . . . 144, 145, 149
Tibeaudo's Estate, *Re*, (1863) 14 Ir. Ch. R. 322 5
Tickner *v.* Old, (1874) 18 Eq. 422; 31 L. T. 29; 22 W. R. 871 . . . . . 143, 145, 147
Tindal, *Re*, (1892) 9 Times L. R. 24 14
Tinkler, *Re*, (1875) 20 Eq. 456; 45 L. J. Ch. 135 . . . 127
Todd *v.* Moorhouse, (1874) 19 Eq. 69; 32 L. T. 8; 23 W. R. 155 121
Tollemache *v.* Tollemache, (1842) 1 Ha. 456; 6 Jur. 364 . 30
Tomlinson, *Re*, (1898) 1 Ch. 232; 67 L. J. Ch. 97; 78 L. T. 12; 46 W. R. 299 . . . . . 52, 57, 58
Tomlinson *v.* Andrew (1897). *See* Tomlinson, *Re.*
Tooker *v.* Annesley, (1832) 5 Sim. 235 . . . . 30, 31
Townson *v.* Harrison (1889). *See* Harrison, *Re.*
Tracy *v.* Hereford, (1786) 2 Bro. C. C. 128 . . . 109, 110
Trail *v.* Jackson, (1877) 46 L. J. Ch. 684; 25 W. R. 802 . 89
Treacher, *Re*, (1868) 18 L. T. 810 45
Tucker, *Re*, (1895) 2 Ch. 468; 64 L. J. Ch. 513; 72 L. T. 619; 43 W. R. 581 . . . . 61, 80, 81, 83, 85, 86
Tucker *v.* Boswell, (1843) 5 Beav. 607 . . . . 135, 137
Tudball *v.* Medlicott, (1888) 36 W. R. 886 59
Tufnell, *Ex p.*, (1862) 14 Ir. Jur. 95 99
Tully *v.* Tully, 3 Ves. 378 30
Turner *v.* Newport, (1846) 2 Ph. 14; 1 Coop. (t. Cot.) 147; 9 L. T. O. S. 213 128
Twyford Abbey, *Re*, (1882) 30 W. R. 268; 45 L. T. 745 . 101
Tyrrell *v.* Clark, (1854) 2 Dr. 86; 2 Eq. Rep. 333 . . . 22

Unwin *v.* Eykyn, (1866) W. N. 268 24
Upton *v.* Brown, (1884) 26 Ch. D. 588; 54 L. J. Ch. 614; 51 L. T. 591; 32 W. R. 679 125

Vachell *v.* Roberts, (1863) 32 Beav. 140 153
Van Straubenzee, *Re*, (1901) 2 Ch. 779; 70 L. J. Ch. 825; 85 L. T. 541 . . . . . 2, 137
Varlo *v.* Faden, (1859) 1 D. F. & J. 211; 29 L. J. Ch. 230; 1 L. T. 176 17

PAGE
Vaughan *v.* Buck, (1841) 1 Ph. 75 ; 6 Jur. 23 . . . 153
Verner *v.* Gen. & Com. Invest. Trust, (1894) 2 Ch. 239 49, 130
Verney, *Re*, (1898) 1 Ch. 508 ; 67 L. J. Ch. 243 ; 78 L. T. 191 ; 46 W. R. 348 . . . . . 80, 81, 117
Verney *v.* Verney, (1750) 1 Ves. Sen. 428 ; Amb. 88 . . 88
Vernon *v.* Manvers, (1862) 31 Beav. 617 ; 32 L. J. Ch. 244 ; 1 N. R. 117 ; 9 Jur. N. S. 9 ; 7 L. T. 553 . . . 102
Vickers *v.* Scott, (1834) 3 My. & K. 500 ; 3 L. J. Ch. 223 . 3
Vigor *v.* Harwood, (1841) 12 Sim. 172 3
Vincent *v.* Spicer, (1856) 22 Beav. 380 ; 2 Jur. N. S. 654 ; 25 L. J. Ch. 589 ; 27 L. T. O. S. 226 ; 4 W. R. 667 . 34
Vine *v.* Raleigh, (1891) 2 Ch. 13 ; 60 L. J. Ch. 675 . . 84
Viner *v.* Vaughan, (1840) 2 Beav. 466 ; 4 Jur. 332 . 36, 37

Waddell *v.* Waddell, (1818) 6 Dow. 279 114
Wadley *v.* Wadley, (1845) 2 Coll. 11 92
Waldo *v.* Waldo, (1835) 7 Sim. 261 ; 40 R. R. 134 . . 30
Waldo *v.* Waldo, (1841) 12 Sim. 107 ; 10 L. J. Ch. 312 30, 33
Waldron *v.* Bogue, (1904) 1 I. R. 240 57
Walker, *Re*, (1894) 1 Ch. 189 ; 63 L. J. Ch. 314 ; 70 L. T. 259 . . . . . 82, 83
Walker *v.* Appach (1885). *See* Hobson, *Re*.
Walker *v.* Martineau (1883). *See* Grant, *Re*.
Walker *v.* Shore, (1815) 19 Ves. 387 3
Walker *v.* Tillott, (1835) 4 L. J. Ch. 232 ; 41 R. R. 212 . . 1
Walpole *v.* Boughton, (1850) 12 Beav. 622 68
Walsh, *Re*, (1881) 7 L. R. Ir. 554 . . . . . 47, 100
Ward *v.* Combe, (1836) 7 Sim. 634 ; 40 R. R. 198 . . 13
Waring *v.* Coventry, (1834) 2 My. & K. 406 ; 39 R. R. 230 . . . . . 107, 108
Warren *v.* Rudall, (1860) 1 J. & H. 1 ; 2 L. T. 693 ; 8 W. R. 331 . . . . . 55, 56
Wastell *v.* Leslie, (1844) 13 L. J. Ch. 205 ; 8 Jur. 367 ; 2 L. T. O. S. 473 . . . . . 107, 113
Waters *v.* Waters, (1875) 32 L. T. 306 n. 147
Waugh, *Re*, (1877) 46 L. J. Ch. 629 ; 25 W. R. 555 ; W. N. 1877, 114 122
Weall, *Re*, (1889) 42 Ch. D. 674 ; 58 L. J. Ch. 713 ; 61 L. T. 238 ; 37 W. R. 779 96
Wearing *v.* Wearing, (1856) 23 Beav. 99 153
Weatherall *v.* Thomas (1900). *See* Thomas, *Re*.
Welch *v.* Peterborough, (1885) 15 Q. B. D. 432 . . . 8
Weld-Blundell *v.* Wolseley, (1903) 2 Ch. 664 ; 73 L. J. Ch. 45 ; 89 L. T. 59 ; 51 W. R. 635 32
Wellesley *v.* Mornington, (1857) 27 L. J. Ch. 150 ; 6 W. R. 177 4
Wellesley *v.* Wellesley, (1834) 6 Sim. 497 ; 38 R. R. 161 32, 33
Wells, *Re*, (1889) 43 Ch. D. 281 ; 59 L. J. Ch. 113 ; 61 L. T. 806 ; 38 W. R. 327 . . . . . 17, 136
Wells *v.* Wells (1889). *See* Wells, *Re*.
Wentworth *v.* Wentworth, (1900) A. C. 163 ; 81 L. T. 682 . 4, 17, 38, 39, 141
Wheeler *v.* Tootel, (1868) 16 W. R. 273 103

PAGE
Whitbread *v.* Smith, (1854) 3 D. M. & G. 741 . . . 107
White *v.* White, (1804) 9 Ves. 554; 4 R. R. 161 . . 88, 90
Whitehead, *Re*, (1894) 1 Ch. 678; 63 L. J. Ch. 229; 70 L. T. 122; 42 W. R. 491 . . . . . 135, 143, 147
Whiteley, *Re*, (1886). *See* Learoyd *v.* Whiteley.
Whitfield *v.* Bewit, (1724) 2 P. Wms. 240 . . . 25, 28, 36
Whiting *v.* Whiting, (1841) 5 Jur. 1127 16
Whitton, *Re*, (1869) 8 Eq. 352 98
Whitwham *v.* Piercy (1906). *See* Piercy, *Re*.
Whyte, *Re*, (1857) 7 Ir. Ch. R. 61 108
Wickham *v.* Wickham, (1815) 19 Ves. 419; Coop. G. 288 . 34
Wight, *Re*, (1858) 6 W. R. 718 70
Wilday *v.* Sandys, (1869) 7 Eq. 455; 20 L. T. 861; 17 W. R. 603. 145
Wilkes, *Re*, (1880) 16 Ch. D. 597; 50 L. J. Ch. 199 . 44, 46
Wilkinson *v.* Duncan, (1857) 23 Beav. 469; 3 Jur. N. S. 530; 26 L. J. Ch. 495; 29 L. T. O. S. 35; 5 W. R. 398 100, 154, 156
Willan, *Re* (1882). *See* Twyford Abbey, *Re*.
Williames, *Re*, (1885) 54 L. T. 105 58
Williams *v.* Bolton, (1784) 1 Cox, 72; 3 P. Wms. 268 n.; 4 R. R. 21. 29
Williams *v.* Jenkins, (1894) W. N. 176 104
Williams *v.* Williams, (1808) 15 Ves. 419 31
Willis, *Re*, (1902) 1 Ch. 15; 71 L. J. Ch. 73; 85 L. T. 436; 50 W. R. 70 . . . . . 55, 58, 60, 61
Wilson, *Re*, (1862) 2 J. & H. 619; 1 N. R. 301; 9 Jur. N. S. 1043; 32 L. J. Ch. 191; 7 L. T. 772; 11 W. R. 295 . 8, 44
Wilson, *Re*, (1907) 1 Ch. 394; 76 L. J. Ch. 210; 96 L. T. 453 9, 148, 149
Wilson *v.* Foster, (1859) 28 L. J. Ch. 410; 32 L. T. O. S. 250 103
Wilson *v.* Halliley, (1830) 1 Russ. & M. 590; 8 L. J. O. S. Ch. 171; 32 R. R. 286 . . . . . 113, 114
Wilson *v.* Oliver (1908). *See* Oliver, *Re*.
Winthrop *v.* Winthrop, (1846) 15 L. J. Ch. 403 . . . 99
Witts *v.* Steere, (1807) 13 Ves. 363; 9 R. R. 192 . . . 11
Wolf *v.* Hill, (1806) 2 Sw. 149 n. 31, 33
Wolmer *v.* Forester (1893). *See* Cleveland, *Re*.
Wombwell *v.* Bellasyse, (1825) 6 Ves 110 a (ed. 1827) . 31, 32
Wood, *Re*, (1861) 7 Jur. N. S. 323 97
Wood, *Re*, (1870) 10 Eq. 572; 40 L. J. Ch. 59; 23 L. T. 430; 19 W. R. 59 45
Wood *v.* Gaynon, (1761) Amb. 395 56
Wood *v.* Thomas (1891). *See* Thomas, *Re*.
Woodhouse *v.* Walker, (1880) 5 Q. B. D. 404; 49 L. J. Q. B. 609; 42 L. T. 770; 28 W. R. 765 58
Woods, *Re*, (1904) 2 Ch. 4; 73 L. J. Ch. 204; 90 L. T. 8 4, 38, 40, 140, 142, 143, 147
Wootton, *Re*, (1866) 1 Eq. 589; 35 L. J. Ch. 305; 14 L. T. 125; 14 W. R. 469. 46
Wormald, *Re*, (1908) W. N. 214 85
Wormald *v.* Ollivant (1908). *See* Wormald, *Re*.

PAGE
Wrey *v.* Smith, (1844) 14 Sim. 202 146
Wright, *Re*, (1900) 83 L. T. 159 83
Wright *v.* Lambert, (1877) 6 Ch. D. 649 ; 26 W. R. 206 . 154
Wright *v.* Tuckett, (1860) 1 J. & H. 266 . . . 22, 23

Yates *v.* Yates, (1860) 28 Beav. 637 ; 29 L. J. Ch. 872 ; 3 L. T. 9 ; 6 Jur. N. S. 1023 . . . . . 111, 123, 134

TABLE OF STATUTES.

PAGE

14 Geo. III. c. 78, s. 83 7
36 Geo. III. c. 52, s. 12 . . . . . 111, 112
s. 13 111
4 & 5 Will. IV. c. 22, s. 2 . . . . . 20, 65, 107
s. 3 . . . . . 20, 65
8 & 9 Vict. c. 18 (Lands Clauses Act, 1845)
s. 34 102
s. 69 . . . . . 42, 43, 44, 60, 70, 71
ss. 70, 71, 72 43
s. 73 . . . . . 43, 44, 102
s. 74 . . . . . 42, 44, 47, 48
c. 56 (Land Drainage Act, 1845)
s. 5 72
s. 10 . . . . . 72, 116
s. 11 61
c. 118, ss. 133, 134, 137 102
9 & 10 Vict. c. 101 (Public Money Drainage Act, 1846)
s. 34 72
s. 38 . . . . . 72, 117
s. 39 61
16 & 17 Vict. c. 51, ss. 21, 32, 42 112
19 & 20 Vict. c. 120, s. 23 71
s. 29 103
22 & 23 Vict. c. 35, s. 32 139
23 & 24 Vict. c. 124, ss. 20, 35, 36, 37 93
27 & 28 Vict. c. 114 (Improvement of Land Act, 1864)
s. 9 . . . . . 74, 75
ss. 26, 27, 30, 31 73
s. 34 . . . . . 26, 38
s. 51 73
s. 66 . . . . . 73, 117
s. 72 62
s. 74 53
s. 76 62
31 & 32 Vict. c. 40 (Partition Act, 1868) 46
33 & 34 Vict. c. 35 (Apportionment Act, 1870)
ss. 2, 3 20
s. 4 . . . . . 21, 65, 107
s. 5 . . . . . 21, 23
s. 6 . . . . . 20, 65

PAGE

33 & 34 Vict. c. 35, s. 7 . . . . . 20, 22
c. 56, s. 4 75
s. 8 53
34 & 35 Vict. c. 84, s. 3 75
36 & 37 Vict. c. 66, s. 25 . . . . . 32, 54
39 & 40 Vict. c. 30, s. 1 71
40 & 41 Vict. c. 18 (Settled Estates Act, 1877)
s. 4 . . . . . 38, 40
s. 17 101
s. 21 . . . . . 62, 71
s. 34 . . . . . 47, 60, 71
ss. 36, 37 47
s. 41 103
c. 31, s. 5 75
44 & 45 Vict. c. 41, s. 42 53
s. 43 136
45 & 46 Vict. c. 38 (Settled Land Act, 1882)
s. 11 . . . . . 39, 40, 41
s. 18 95
s. 21 . . . . . 47, 76, 93, 95, 103, 115
s. 22 . . . . . 47, 76, 115
s. 25 . . . . . 77, 78, 80, 81
s. 26 . . . . . 76, 84, 85
s. 28 . . . . . 27, 33, 54, 62
s. 29 . . . . . 26, 38
s. 30 75
s. 32 . . . . . 60, 61, 71, 72
s. 33 70
s. 34 48
s. 35 27
s. 36 101
s. 37 48
s. 48 62
s. 53 . . . . . 5, 6
s. 56 84
46 & 47 Vict. c. 61 (Agricultural Holdings Act, 1883)
s. 29 . . . . . 79, 116
s. 30 116
47 & 48 Vict. c. 18, s. 4 5
48 & 49 Vict. c. 72, s. 11 78
50 & 51 Vict. c. 30 (Settled Land Act, 1887)
s. 1 117
s. 2 . . . . . 54, 62
51 & 52 Vict. c. 59, s. 7 53
s. 10, 11 92
52 & 53 Vict. c. 30, s. 2 . . . . . 54, 62, 72, 73, 75
c. 32, s. 3 . . . . . 138, 139
c. 36, s. 3 47
53 & 54 Vict. c. 69 (Settled Land Act, 1890)
s. 11 . . . . . 104, 118, 119
s. 13 . . . . . 77, 78, 79, 81, 82, 83
s. 15 . . . . . 84, 85, 117
s. 18 78

PAGE
53 & 54 Vict. c. 70, s. 74 78
55 & 56 Vict. c. 58 18
56 & 57 Vict. c. 53 (Trustee Act, 1893)
s. 1 . . . . . 138, 139
s. 18 53
s. 19 92
s. 42 98
57 & 58 Vict. c. 30 (Finance Act, 1894)
s. 5 112
s. 9 . . . . . 96, 112
s. 18 112
c. 46 (Copyhold Act, 1894)
ss. 26, 30, 31 48
s. 36 . . . . . 95, 102
s. 37 102
59 & 60 Vict. c. 28, ss. 18, 19 112
60 & 61 Vict. c. 44 75
62 & 63 Vict. c. 46, s. 1 75
63 & 64 Vict. c. 50 (Agricultural Holdings Act, 1900)
s. 1 . . . . . 79, 116
s. 3 116
3 Ed. VII. c. 31, s. 1 . . . . . 54, 62, 72, 73, 75
c. 37, s. 48 8
4 Ed. VII. c. 34, s. 3 8
6 Ed. VII. c. 55 (Public Trustee Act, 1906)
s. 9 96
s. 13 97
8 Ed. VII. c. 28 (Agricultural Holdings Act, 1908)
s. 15 116
s. 20 . . . . . 79, 116
ss. 42, 49 116

CAPITAL AND INCOME.

CHAPTER I.

RENTS AND PROFITS.

Specific property.

Wasting property.

WHERE specific property is settled, either by deed or will, without any trust for conversion, the life-tenant is entitled to the income actually produced during his life-tenancy, whether the property be permanent, as in the case of real estate, or of a wasting nature, such as leaseholds (*Perrins* v. *Bellamy*, (1899) 1 Ch. 797; see *Gibson* v. *Bott*, 7 Ves. at p. 96; *Howe* v. *Dartmouth*, 7 Ves. at p. 147; *Pickering* v. *Pickering*, 4 My. & Cr. at p. 299), or terminable annuities: *Walker* v. *Tillott*, 4 L. J. Ch. 232; *Cockran* v. *Cockran*, 14 Sim. 248; and notwithstanding a power for the trustees to vary securities: *Lord* v. *Godfrey*, 4 Madd. 455. As to mines, see *post*, p. 36.

Residuary real estate.

A residuary devise of real estate, being in its nature specific (see *Lancefield* v. *Iggulden*, 10 Ch. 136), the life-tenant is entitled to the rents as from the testator's death (*Howe* v. *Dartmouth*, 7 Ves. at p. 147), including the intermediate rents of real estate specifically devised on a contingency which has not yet happened: see *Re Burton*, (1892) 2 Ch. at p. 43.

Residuary personalty.

But the right to income of residuary personal estate is governed by the Rule in *Howe* v. *Lord Dartmouth* (see *post*, p. 137), except where the residue consists of authorized investments or is settled in such a way as

Chap. I.

to show an intention that the life-tenant should enjoy it in specie, in which case the life-tenant is entitled to the full income, as if the property were specifically bequeathed: see Chap. X.

It is apprehended that the observations in the judgments in *Prendergast* v. *Prendergast*, 3 H. L. C. at pp. 218, 219, and *Hollier* v. *Burne*, 16 Eq. at p. 167, as to the life-tenant of a perishable or terminable estate settled by will not being entitled to enjoy it in specie without an express direction for that purpose, refer to property forming part of residue, as specific bequests are not within the rule: *Howe* v. *Dartmouth*, 7 Ves. at p. 147; *Re Van Straubenzee*, (1901) 2 Ch. at p. 782.

Property settled by deed.

The Rule in *Howe* v. *Lord Dartmouth* does not apply to any property settled by deed: *Re Van Straubenzee*, (1901) 2 Ch. 779; *Slade* v. *Chaine*, (1908) 1 Ch. at p. 533; hence leaseholds, chattels and reversionary interests, bound by a covenant to settle after-acquired property, stand on the same footing as property specifically settled: *Milford* v. *Peile*, 17 Beav. 602; *Hope* v. *Hope*, 1 Jur. N. S. 770; *Re Van Straubenzee*, (1901) 2 Ch. 779.

Renewable leaseholds.

Where renewable leaseholds are settled and renewal becomes impossible, if there is merely a discretionary power to renew, the life-tenant is entitled to enjoy them in specie: *Tardiff* v. *Robinson*, 27 Beav. 629 n.; *Hayward* v. *Pile*, 5 Ch. 214.

But if there is an overriding trust for renewal out of income, and renewal becomes impossible, the life-tenant is not entitled to enjoy the leaseholds in specie, but only the income of the fund produced by their sale: *Maddy* v. *Hale*, 3 Ch. D. 327; see *Hollier* v. *Burne*, 16 Eq. 163.

Where, however, the renewal of specifically bequeathed leaseholds had become impossible by the

testator's own act, the life-tenant was held entitled to enjoy them in specie, notwithstanding a trust to renew out of residue, which was settled in the same way: *Pinfold* v. *Shillingford*, 46 L. J. Ch. 491.

Trust for sale. Real estate.

A settlement of real estate by way of trust for sale, whether by deed or will, entitles the life-tenant to the rents until sale, unless otherwise disposed of: *Casamajor* v. *Strode*, 19 Ves. 390 n.; *Fitzgerald* v. *Jervoise*, 5 Madd. 25; *Re Laing*, 1 Eq. 416; *Re Carter*, 41 W. R. 140; *Hope* v. *D'Hedouville*, (1893) 2 Ch. 361.

And where real and residuary personal estate are devised and bequeathed together upon trust for sale, and the proceeds are settled as a mixed fund, the life-tenant is entitled to the rents of any unsold real estate, although the right to the income of the personalty is governed by the Rule in *Howe* v. *Lord Dartmouth*; see *Re Searle*, (1900) 2 Ch. 829; *Re Oliver*, (1908) 2 Ch. 74; and see *Re Darnley*, (1907) 1 Ch. 159.

If the land produces no income, the life-tenant gets nothing so long as conversion is not unduly delayed: see *Re Searle*, (1900) 2 Ch. at p. 836; and any right to compensation for undue delay may be lost by consenting to it: see *Walker* v. *Shore*, 19 Ves. 387.

In the case of a settlement by will of real estate by way of trust for sale, a direction to invest the intermediate rents with the proceeds of sale does not deprive the life-tenant of the right to such rents for more than a year from the testator's death: *Noel* v. *Henley*, 7 Price, 241; *Vickers* v. *Scott*, 3 M. & K. 500; *Smith* v. *Dungannon*, 3 Ir. Ch. Rep. 316; and see *Vigor* v. *Harwood*, 12 Sim. 172, where such a direction was treated as insufficient to deprive the life-tenant of the rents, even during the first year after the death.

Wasting property.

Property of a wasting or fluctuating nature (such as leaseholds or shares in a company), settled by way of trust for sale, stands on a different footing; and where

Chap. I.

so settled by will, without any provision as to the income until sale, the life-tenant is entitled to so much only of the intermediate income as would be equal to the dividends of the consols which might have been purchased with the proceeds if the property had been converted at the end of a year from the testator's death; the rest of the income being treated as capital (*Anderson* v. *Read*, 22 W. R. 527: see *Wentworth* v. *Wentworth*, (1900) A. C. at p. 171), of which the life-tenant is only entitled to the income: see *Re Woods*, (1904) 2 Ch. 4; and as to mines, see *post*, p. 38.

Where, however, the rents and profits of wasting property until sale are directed to be applied as income, the rights of the parties are the same as if there were no trust for sale: see cases as to residuary personalty: *post*, p. 146; and if the trust for sale is only exercisable with the consent of the life-tenant, there is no conversion until his consent is obtained, so that he is entitled to the intermediate income without any such direction: see *Askew* v. *Woodhead*, 14 Ch. D. at p. 34.

Portions fund.

Where a fund is raised out of settled land for discharging portions before they are payable, the life-tenant is entitled to the intermediate income of the fund: *Wellesley* v. *Mornington*, 27 L. J. Ch. 150.

Annual and casual profits.

The life-tenant of a settled estate is entitled to all annual and casual profits which accrue during his life-tenancy, in the absence of any provision to the contrary in the settlement: see *Brigstocke* v. *Brigstocke*, 8 Ch. D. at p. 363.

Thus, he is in general entitled to:—

Fruit.

(1) All annual produce, such as fruit and grass: see *Campbell* v. *Wardlaw*, 8 App. Cas. at p. 645;

Rent.

(2) Rent, whether payable quarterly or at longer intervals, and whether at the end of a quarter or in advance: see *Brigstocke* v. *Brigstocke*, 8 Ch. D. at p. 363; but as to rent of mines, see *post*, pp. 38—40.

Fines.

(3) Fines and heriots payable by tenants on the renewal of their leases, whether the renewal is under a power (*Milles* v. *Milles*, 6 Ves. 761; *Simpson* v. *Bathurst*, 5 Ch. 193), or in pursuance of the settlor's covenant: *Brigstocke* v. *Brigstocke*, 8 Ch. D. 357; but not fines taken without authority: *Ib.*; nor fines paid by tenants on a sale of settled land in consideration of a condition being imposed on the purchaser to renew their leases: *Re Tibeaudo*, 14 Ir. Ch. Rep. 322; nor fines received on the grant of leases under the powers of the Settled Land Act, 1882, as such fines are to be deemed capital money: see 47 & 48 Vict. c. 18, s. 4.

Interest on mortgage.

(4) Interest on a mortgage debt, whether payable at regular intervals or in a lump sum at the mortgagor's death, and in the latter case, notwithstanding a proviso that no property not actually producing income shall be treated as producing income: *Re Lewis*, (1907) 2 Ch. 296; and so as to interest payable by deferred instalments: *Caulfield* v. *Maguire*, 2 Jo. & Lat. 141.

Interest on purchase money.

(5) Interest stipulated for by the life-tenant on a sale of part of the estate under the powers of the Lands Clauses Act, 1845, though exceeding 4 per cent.: *Re Hungerford*, 1 Jur. N. S. 845.

Damages for breach of covenant.

(6) Damages recovered by the life-tenant from tenants for breach of covenant: *Noble* v. *Cass*, 2 Sim. 343; but where the lease containing the covenant is granted under the powers of the Settled Land Act, 1882, the damages recovered are capital, as by reason of sect. 53, the covenant enures for the benefit of all parties interested: see *Mitchell* v. *Armstrong*, 17 Times L. R. 495; and it is submitted that in any case where the whole damage to the inheritance is recovered, it should be treated as capital.

Compensation for waiver of restrictions.

(7) Compensation received for waiver of restrictive conditions, if imposed on grants by the trustees of the settlement, though not if imposed on grants by the settlor: *Cowley* v. *Wellesley*, 1 Eq. 656.

Chap. I.

Money for surrender.

(8) Money received from a tenant for accepting a surrender of his lease: *Re Hunloke*, (1902) 1 Ch. 941; unless the lease was granted under the powers of the Settled Land Act, 1882, in which case, sect. 53 makes the life-tenant a trustee, and the money is payable by instalments to the persons for the time being entitled to the rent during the remainder of the term: *Re Rodes*, (1909) 1 Ch. 815; and see *Re Guthrie*, (1902) 1 Ch. 942 n., where it was treated as capital.

Insurance money.

Money received under a policy of fire insurance, being an indemnity fund, stands on a distinct footing; and it would seem on principle that if a life-tenant insures the settled property, and not merely his limited interest therein, he is bound to hold the insurance money for the benefit of the estate: see *Castellain* v. *Preston*, 11 Q. B. D. at p. 398. The views taken by the judges who have considered the question are, however, conflicting.

In *Norris* v. *Harrison*, 2 Madd. 268, insurance money, received under a policy effected by a life-tenant, was held to be capital. And this case seems to have been the one referred to by Lord St. Leonards in *Hill* v. *Browne*, Dru. at p. 433, as having decided that if a life-tenant insures against fire he does so as much for the benefit of the remainderman as for himself: and probably the same case was referred to in *Garden* v. *Ingram*, 23 L. J. Ch. at p. 479, where his Lordship stated that it had been decided in a case where a life-tenant had insured, that the remainderman was entitled to the policy.

Vice-Chancellor Shadwell and Lord Justice Cotton, however, appear to have considered that the decision in *Norris* v. *Harrison* turned on the fact that the executor and residuary legatee of the life-tenant had abandoned any claim to the insurance money: see *Noble* v. *Cass*, 2 Sim. at p. 347; *Rayner* v. *Preston*, 18 Ch. D. at p. 8.

And in a recent case, the life-tenant was held entitled to the money paid under a policy effected by himself, although the money had been invested by the trustees and treated as capital for fourteen years: *Gaussen* v. *Whatman*, 93 L. T. 101; the case being treated as governed by the decisions as to insurances effected out of income during the minority of a tenant in tail: and see *Re Ely*, (1904) 1 I. R. at p. 84.

14 Geo. III. c. 78, s. 83.

In the case of buildings, the Fire Office is in general bound, upon the request of the remainderman or any other person interested therein, to cause the insurance money to be laid out in rebuilding: see 14 Geo. III. c. 78, s. 83, an enactment which is not confined to places within the metropolitan district, but applies to England generally: see *Ex p. Gorely*, 4 D. J. & S. 477; *Re Quicke*, (1908) 1 Ch. 887.

Accordingly, where a house which had been insured out of income by the settlement trustees, under their statutory powers (see *post*, p. 53), was destroyed by fire, and the remainderman required the insurance money to be applied in rebuilding, the life-tenant was held not entitled to any charge for the amount so applied: *Re Quicke*, (1908) 1 Ch. 887.

Heirlooms.

In the last-mentioned case, however, the insurance money of heirlooms insured under the same powers, not being within the Act of George III., was held to belong to the life-tenant; but it is to be observed that the remainderman did not oppose, and that *Castellain* v. *Preston*, 11 Q. B. D. 398, was not cited; and it is submitted that any insurance under the statutory powers ought to be treated as effected for the benefit of the estate, and that on that ground, as well as on the ground of the insurance being an indemnity, the insurance money should be capital.

Irish Land Act bonus.

The bonus payable out of the Land Purchase Aid Fund on the sale of Irish land under the Irish Land

Chap. I.

Act, 1903, where the vendor is a life-tenant, may (subject to the proviso in subsect. 1 and subsect. 4 of sect. 48 of that Act) be retained by him for his own use and benefit: 4 Ed. VII. c. 34, s. 3 (reversing the decision in *Re Ely*, (1904) 1 I. R. 66); see *Re Powell*, (1908) 1 I. R. 15; *Re Roberts*, (1908) 1 I. R. 222; *Re Ker*, (1908) 1 I. R. 293; *Re Goodall*, (1909) 1 Ch. 440.

Copyhold fines.

The life-tenant of a manor is entitled to:—

(1) Fines received from copyhold tenants on admittance: see *Brigstocke* v. *Brigstocke*, 8 Ch. D. at p. 363;

(2) Fines received on copyhold grants for lives: *Re Medows*, (1898) 1 Ch. 300;

(3) Fines received on grants of waste land: *Cowley* v. *Wellesley*, 1 Eq. 656;

(4) Preliminary fines received on compulsory enfranchisement under the Copyhold Acts: see *Cowley* v. *Wellesley*, 1 Eq. 656; and see *Re Wilson*, 2 J. & H. 619.

Advowson.

The life-tenant of an advowson has the right of presentation on any vacancy occurring in his lifetime: *Welch* v. *Peterborough*, 15 Q. B. D. 432; and where the settlement is by way of trust for sale, the life-tenant of the proceeds has the same rights: *Briggs* v. *Sharp*, 20 Eq. 317; see *Sherrard* v. *Harborough*, Amb. 166.

Chattels.

Where furniture or other chattels are settled, the life-tenant is in general only entitled to their use: *Clarges* v. *Albemarle*, 2 Vern. 245; *Re Hall*, 1 Jur. N. S. 974; see *Randall* v. *Russell*, 3 Mer. at p. 195.

Consumables.

But a specific gift of consumable articles, such as corn or wine, to one for life, carries the absolute interest, except in the case of stock-in-trade, and any limitation over to the remainderman is void: *Randall* v. *Russell*, 3 Mer. at p. 194; *Andrew* v. *Andrew*, 1 Coll. 690; *Clive* v. *Clive*, 2 Eq. Rep. 913; *Phillips* v. *Beal*, 32 Beav. 25; see *Cockayne* v. *Harrison*, 13 Eq at p. 434; and see *Re Colyer*, 55 L. T. 344.

Stock-in-trade.

In the case, however, of farming stock or other consumable stock-in-trade (which is consumed with the object of being reproduced), the life-tenant is only entitled to the profits made by its use, and is bound to keep up the stock : substituted articles becoming subject to the settlement : and if it is all sold off on the business being discontinued, he takes only a life interest in the proceeds : *Groves* v. *Wright*, 2 K. & J. 347 ; *Cockayne* v. *Harrison*, 13 Eq. 432 ; *Myers* v. *Washbrook*, (1901) 1 Q. B. 360 ; see *England* v. *Downs*, 6 Beav. 269 ; unless a contrary intention is shown, as, by a provision that the life-tenant is not to be liable for any diminution or depreciation in the stock : *Breton* v. *Mockett*, 9 Ch. D. 95 ; and see *Bryant* v. *Easterson*, 7 W. R. 298.

Deer, &c.

Deer in a park and pigeons in a dovecote stand on the same footing as farming stock : *Maynard* v. *Gibson*, W. N. 1876, 204.

Authorized investments.

Where investments are duly set apart to answer a settled legacy, the life-tenant is entitled to the whole income : *Re Wilson*, (1907) 1 Ch. 394.

Unauthorized investments.

And where a settled fund is placed by the trustees on an unauthorized investment, without loss, the life-tenant is entitled to the whole income, without liability to account to the remainderman for any excess above what would have been produced by authorized investments.

Thus, where trustees, without authority, lent trust moneys at 5 per cent. interest, it was held that the life-tenant was entitled to the whole of such interest : *Stroud* v. *Gwyer*, 28 Beav. 130.

So, where a trustee sold out settled consols and used the proceeds in paying off a private debt, but afterwards replaced the capital, having in the meantime paid the life-tenant income at a higher rate of interest, the remainderman was held not entitled to any part of such income : *Slade* v. *Chaine*, (1908) 1 Ch. 522.

Chap. I.

In one case, where a settled fund was, without authority, left in a wine business producing large profits, which had not been drawn, the life-tenant was allowed only 4 per cent. interest on the capital: the balance of the profits being treated as capital, producing interest at the same rate: *Re Hill*, 50 L. J. Ch. 551.

But in cases where the Rule in *Howe* v. *Lord Dartmouth* does not apply (see *ante*, p. 2), it would seem that no valid distinction can be drawn between an unauthorized investment existing at the date of the settlement and one made by the trustees (see *Re Hill*, 50 L. J. Ch. at p. 553); and since the decision in *Stroud* v. *Gwyer* has been approved by the Court of Appeal in *Slade* v. *Chaine*, (1908) 1 Ch. 522, it is thought that *Re Hill* can no longer be regarded as an authority.

As to cases where a loss occurs, see Chap. IX.

Stock and shares: current profits.

Where stock or shares of a public company are settled, the decision of the company, in accordance with its regulations, either to divide its current profits as income, or to capitalize them, is binding as between life-tenant and remainderman, in the absence of any special provision in the settlement: *Re Barton*, 5 Eq. 238.

Dividends.

The life-tenant is accordingly entitled to all dividends declared out of current profits, although exceeding 4 per cent. per annum: *Price* v. *Anderson*, 15 Sim. 473; and whether described as 'extraordinary dividend' or 'special dividend' (*Re Hopkins*, 18 Eq. 696); and (*semble*) a dividend is presumed to be provided out of current profits in the absence of evidence to the contrary: see *Barclay* v. *Wainewright*, 14 Ves. 66.

Bonus out of current profits.

The life-tenant is also entitled to any bonus declared out of current profits: *Preston* v. *Melville*, 16 Sim. 163; *Johnson* v. *Johnson*, 15 Jur. 714; *Hebert* v. *Bateman*, 1 W. R. 191; *Murray* v. *Glasse*, 23 L. J. Ch. 126; *Plumbe* v. *Nield*, 29 L. J. Ch. 618.

Money received by a company in respect of an old debt being treated as profit of the year in which it is paid, a bonus declared thereout is income: *Maclaren* v. *Stainton*, 3 D. F. & J. 202; *Edmondson* v. *Crosthwaite*, 34 Beav. 30; and the presumption seems to be that a bonus is provided out of current profits where the contrary is not shown: *Dale* v. *Hayes*, 40 L. J. Ch. 244.

If, however, the company resolves to capitalize its current profits, and issues new shares rateably to its members to represent the same, any shares so issued in respect of settled shares become part of the capital fund under the settlement: *Re Barton*, 5 Eq. 238.

As to what acts on the part of the company amount to capitalization of profits, see *post*, p. 12.

A provision in a settlement for capitalizing bonuses has been held not to include bonuses declared out of current profits: *Hollis* v. *Allan*, 14 W. R. 980; *Re Baker*, 8 Times L. R. 7.

Accumulated profits.

The rights of life-tenant and remainderman of settled shares in a public company, in respect of bonuses declared out of accumulated profits, are not determined by the time at which the profits accrued, but depend on the power of the company to capitalize its profits, and on its exercise of that power: see *Bouch* v. *Sproule*, 12 App. Cas. 385.

Where no power to increase capital.

Where the company has no power to increase its capital, but has accumulated profits and used them for capital purposes, so that they have in fact become part of its floating capital, any bonus declared out of such profits is capital, although payable in cash and although the profits may have arisen during the life-tenancy: *Brander* v. *Brander*, 4 Ves. 800; *Paris* v. *Paris*, 10 Ves. 185; *Clayton* v. *Gresham*, 10 Ves. 288; *Witts* v. *Steere*, 13 Ves. 363; *Ex p. Hodgens*, 11 Ir. Eq. Rep. 99 (all cases of Bank Stock): see *Irving* v. *Houstoun*, 4 Paton Sc. App. 521; and see *Bouch* v. *Sproule*, 12 App. Cas. at

Floating capital.

Chap. I.

pp. 393, 397; unless a contrary intention is shown by the settlement: *Re Mittam*, 4 Jur. N. S. 1077 (where bonuses were by the settlement expressly made payable to the life-tenant).

And if such a company is empowered by statute to increase its capital, and resolves to divide the additional stock among the proprietors, all new stock allotted in respect of settled stock is capital: *Hooper* v. *Rossiter*, 13 Price, 774.

Where power to increase capital.

Where the company has power under its articles or incorporating Act, either to distribute its profits as dividends or to convert them into capital, the decision of the company, in accordance with its regulations, is binding on everybody interested under the settlement: *Bouch* v. *Sproule*, 12 App. Cas. 385.

Special bonus.

Accordingly, if a company of this kind resolves to divide its accumulated profits as dividends, any dividend so allotted in respect of settled shares belongs to the life-tenant as income, whether described as 'bonus dividend' (*Re Northage*, 60 L. J. Ch. 488), or 'special bonus': *Re Alsbury*, 45 Ch. D. 237.

New shares.

But if such a company resolves to appropriate accumulated profits to increase its capital, and issues new shares rateably to its members to represent the same, any shares so issued in respect of settled shares, become part of the capital fund under the settlement: *Bouch* v. *Sproule*, 12 App. Cas. 385; *Baring* v. *Ashburton*, 16 W. R. 452.

Capitalization of profits.

The question whether a company, having power to capitalize its profits, has actually done so, is a question of fact in each case: see *Re Malam*, (1894) 3 Ch. at

Resolution to capitalize.

p. 585. But it seems that in general an actual resolution to increase capital and to apply accumulated profits for that purpose, is required: see *Bouch* v. *Sproule*, 12 App. Cas. at p. 398.

Thus, merely carrying profits to a reserve fund, does not capitalize them: *Bouch* v. *Sproule*, 12 App. Cas. 385; *Re Alsbury*, 45 Ch. D. 237; nor does temporary devotion to capital purposes: *Re Paget*, 9 Times L. R. 88.

Carrying to reserve.

So, sums paid out of profits to the trustees of settled shares on account and in reduction of paid up capital, pursuant to resolutions which were invalid by reason of non-compliance with the Companies Act, 1880, have been held to belong to the life-tenant: *Re Piercy*, (1907) 1 Ch. 289.

Paying off capital.

But where a company, in accordance with its regulations, calls in and pays off subscribed capital out of profits, the sums so paid off are capital: *Re Paget*, 9 Times L. R. 88.

The declaration of a bonus separately from a dividend, with a notice that it would not be receivable under powers of attorney for receiving dividends, was treated as capitalizing it in *Ward* v. *Combe*, 7 Sim. 634; but this decision seems open to question: see *Bouch* v. *Sproule*, 12 App. Cas. at p. 396.

Bonus declared separately.

Where the company gives the shareholders the option of taking the profits either as a cash dividend or in the form of new shares, the intention of the company is to be collected from both the substance and form of the scheme adopted. Thus, if the option is given in such a form that the new shares offered would be worth much more than the cash dividend, it raises a presumption that the company intended to appropriate the profits as capital: see *Bouch* v. *Sproule*, 12 App. Cas. at p. 398; but this presumption may be rebutted by the rest of the scheme: *Re Malam*, (1894) 3 Ch. 578; and see *Re Despard*, 17 Times L. R. 478.

Option of dividend or shares.

The exercise of the option by the trustees of the settlement does not affect the rights of the life-tenant and remainderman: see *Re Malam*, (1894) 3 Ch. 578.

Thus, where the company's intention is not to capitalize, but the new shares offered are worth more

Chap. I.

than the cash dividend, and the trustees accept the new shares, the life-tenant is entitled only to the amount of the dividend appropriated in taking up the shares: *Re Northage*, 60 L. J. Ch. 488; *Re Tindal*, 9 Times L. R. 24; *Re Malam*, (1894) 3 Ch. 578; and the balance of the value of the shares is treated as capital, so as to recoup the remainderman the depreciation caused to the settled shares by the new issue: see *Re Malam*, (1894) 3 Ch. at p. 588.

New shares.

New shares allotted in respect of settled shares subject to their being paid for are capital: *Rowley* v. *Unwin*, 2 K. & J. 138; *Re Bromley*, 55 L. T. 145; *Re Anson*, (1907) 2 Ch. 424; and so are the proceeds of an option to take up new shares at par in respect of settled shares: *Re Curtis*, 1 Times L. R. 332; *Re Anson*, (1907) 2 Ch. 424.

Bonus in lieu of preferential rights.

A bonus declared by a company as compensation for the release of preferential rights attached to settled shares is capital: *Bates* v. *Mackinley*, 31 Beav. 280.

Mistake.

The rights of the life-tenant seem not to be affected by any mistake of the trustees in treating a bonus as capital, although acquiesced in by the life-tenant for a long period.

Thus, new stock, issued as a bonus, was held to belong to the life-tenant, although it was issued to the trustees, and only the dividends thereon were paid to the life-tenant until his death: see *Re Mittam*, 4 Jur. N. S. 1077; and see *Bouch* v. *Sproule*, 12 App. Cas. at p. 391.

An order for investment of a bonus, made without argument in an administration suit, has been held not to prejudice the life-tenant's rights: see *Dale* v. *Hayes*, 40 L. J. Ch. 244.

Surplus assets.

Surplus assets of a company which become divisible

on dissolution, are treated as capital, although forming part of its reserve fund which would have been available for dividends, as the company's power of declaring a dividend cannot be exercised after the commencement of the winding up: *Re Armitage*, (1893) 3 Ch. 337. The result is the same where the company ceases to exist by reason of amalgamation: see *Nicholson* v. *Nicholson*, 30 L. J. Ch. 617.

Directors' fees.

Directors' fees, paid to trustees whose qualification as directors consisted of settled shares, were in one case held to be capital: *Re Francis*, 74 L. J. Ch. 198; but it would seem to follow from the decision of the Court of Appeal in *Re Dover Coalfield*, (1908) 1 Ch. 65, that such fees do not belong to the trust at all.

Partnership profits.

Where a share in a partnership is settled, the rights of the life-tenant and remainderman are regulated by the practice of the Firm, in the absence of any provision in the settlement to the contrary: *Straker* v. *Wilson*, 6 Ch. 503; so that where the practice has been to divide the whole of the profits, the life-tenant takes them as income: *Gow* v. *Forster*, 26 Ch. D. 672; see *Ibbotson* v. *Elam*, 1 Eq. 188; but where the majority of the partners have power to capitalize profits, any profits treated by them as capital belong to the remainderman: *Straker* v. *Wilson*, 6 Ch. 503.

So, where trustees of settled residue, acting under a power in the will, left the testator's capital in his partnership business and entered into fresh articles with the surviving partners, the life-tenant's rights were held to be governed by such articles: *Stroud* v. *Gwyer*, 28 Beav. 130.

Any increase in the value of the capital belongs to the remainderman: *Mousley* v. *Carr*, 4 Beav. 49.

Business.

Where a business is settled, the life-tenant seems

Chap. I.

entitled to the whole profits, unless a contrary intention is shown: see *Re Clapham*, W. N. 1886, 54; subject to keeping up the plant and stock-in-trade out of the profits: see *Dixon* v. *Dutfield*, 5 L. T. 741 (where the whole profits were expressly given to the life-tenant).

Where, however, the annual profits of a business were directed to be held upon the same trusts as were declared of certain proceeds of sale, the interest of which was directed to be paid to one for life, the life-tenant was held entitled only to interest on such profits: *Gee* v. *Liddell*, 35 Beav. 631.

Any increase in the value of the stock-in-trade belongs to the remainderman: *Whiting* v. *Whiting*, 5 Jur. 1127.

Policy bonus.

Where a policy of life assurance is settled, bonuses declared by the Office are capital: *Macdonald* v. *Irvine*, 8 Ch. D. 101; and the settlement trustees seem unable to exercise an option given by the policy of taking the bonus in reduction of premiums: *Ib.*

But where a policy, voluntarily taken out by the life-tenant to replace settled leaseholds, contained such an option, he was held entitled to the bonus: see *Browne* v. *Browne*, 2 Gif. 304.

Mortgage bonus.

Where settled funds are invested on mortgage, the usual six months' interest paid on redemption in lieu of notice, seems to be income; but a bonus paid by the mortgagor for waiver of a stipulation not to pay off for a fixed period, is capital: *Re Scarancke*, 74 L. T. 339.

Trust for accumulation.

The life-tenant's right to income may be defeated by a trust for accumulation, as in *Re Ilford*, 32 Ch. D. 383; or modified by a direction to form a sinking fund out of income for the protection of the settled property, or the discharge of an incumbrance, in which case the fund so created becomes capital, but in the absence of a provision to the contrary, the life-tenant is entitled to the

income produced thereby: *Varlo* v. *Faden*, 1 D. F. & J. 211; see *Re Sudbury & Poynton*, (1893) 3 Ch. 74; *Wentworth* v. *Wentworth*, (1900) A. C. 163.

Maintenance.

Under special circumstances the Court allows the life-tenant maintenance out of income notwithstanding a trust for accumulation: see *Havelock* v. *Havelock*, 17 Ch. D. 807; *Re Collins*, 32 Ch. D. 229; but see *Re Alford*, 32 Ch. D. 383; *Kemmis* v. *Kemmis*, 13 L. R. Ir. 372.

Where a testator gave a fund to trustees to invest in land to be settled, and directed the intermediate income to accumulate, the life-tenant was held entitled to the interest produced by the fund from the end of a year after the trustees had received it, although no land had been purchased: *Parry* v. *Warrington*, 6 Madd. 155.

Accumulation during minority.

Accumulations of income made during the minority of a life-tenant who has a vested interest, belong to him, notwithstanding sect. 43 of the Conveyancing Act, 1881: *Re Humphreys*, (1893) 3 Ch. 1; *Re Wells*, 43 Ch. D. 281; unless a contrary intention is shown by the settlement: see *Crosse* v. *Glennie*, 2 Y. & C. Ch. 237; *Greene* v. *Potter*, 2 Y. & C. Ch. 517.

Where a life-tenant takes an immediate interest subject to being divested on death under age, the accumulations of income during minority belong to him on his attaining full age: see *Green* v. *Potter*, 2 Y. & C. Ch. 517.

But where the life-tenant's interest is contingent on attaining twenty-one, he does not become entitled to such accumulations, but they are treated as an accretion to capital: *Re Bowlby*, (1904) 2 Ch. 685 (overruling *Re Scott*, (1902) 1 Ch. 918).

Failure of accumulation.

If the direction for accumulation is void, or the purpose for which it is directed fails, the life-tenant is remitted to his ordinary rights: *Combe* v. *Hughes*, 12 L. T. 438; *Re Heathcote*, (1904) 1 Ch. 826.

Chap. I.

Thus, where trustees under a void trust to accumulate, invested accumulations of income in land, the life-tenant was held entitled to have the land conveyed to him: *Browne* v. *Stoughton*, 14 Sim. 369; see *Marshall* v. *Holloway*, 2 Sw. 432.

So, accumulations of rent under a trust avoided by the Accumulations Act, 1892 (55 & 56 Vict. c. 58), belong to the life-tenant: *Re Clutterbuck*, (1901) 2 Ch. 285.

Surplus accumulations.

The result is the same where the accumulation is rendered unnecessary by the exercise of an overriding power.

Thus, where the trustees of an estate settled by will were directed to apply the rents in paying the settlor's debts, until the whole should be discharged, and before this was done the debts were raised by sale under order of the Court, it was held that the trust had come to an end and that the life-tenant was entitled to the unused accumulations as well as the subsequent rents: *Tewart* v. *Lawson*, 18 Eq. 490.

So, where the trustees were directed to accumulate the rents until the accumulations should be sufficient to discharge the mortgages affecting the estate and then to pay them off, and before this was done the mortgagees realized their security, it was held that the life-tenant was entitled to be let into possession and to have the surplus accumulations paid to him: *Norton* v. *Johnstone*, 30 Ch. D. 649.

So, where debts, directed by a will to be paid out of the income of all the testator's estate, were discharged by the executrix out of residue, she was held not liable to recoup the residue out of the income of leaseholds devised to her for life: *Re Green*, 40 Ch. D. 610.

And where land is settled subject to a direction to apply the rents in paying off mortgages, if the mortgages are discharged out of the proceeds of sale of part of the land, either under the powers of the Settled Land Acts or under a power contained in the settlement, the

life-tenant is not liable to recoup capital the amount so applied, in the absence of a direction for that purpose: *Re Richardson*, (1900) 2 Ch. 778; *Re Heathcote*, (1904) 1 Ch. 826. And a direction in a will for recouping capital in such a case, not being a provision for payment of debts within sect. 2 of the Thellusson Act, is inoperative after twenty-one years from the testator's death: *Re Heathcote*, (1904) 1 Ch. 826.

Renewal fund.

A fund reserved by trustees out of the rents of settled leaseholds, under a trust to use their utmost endeavours to renew upon reasonable terms and to raise the fines out of the rents or by mortgage, was held to belong to the life-tenant upon renewal becoming impossible: *Morres* v. *Hodges*, 27 Beav. 625; but if there is an overriding trust for renewal out of income, the fund must be treated as capital: *Maddy* v. *Hale*, 3 Ch. D. 327.

Apportionment.

Before the Apportionment Acts, rent and other periodical payments were not apportionable as between life-tenant and remainderman in respect of time, unless expressly made so by the settlement, although interest on money lent and other payments accruing from day to day (including interest on railway debentures (*Re Rogers*, 1 Dr. & Sm. 338), and interest on a share of capital in a partnership: *Ibbotson* v. *Elam*, 1 Eq. 188) were apportionable: see *Lewin* on Apportionment, p. 89.

Apportionment Act, 1834.

This defect was to some extent remedied by the Act 4 & 5 Will. IV. c. 22, whereby rents, annuities, pensions, dividends, moduses, compositions, and other payments, made payable or coming due at fixed periods, under any instrument executed, or (being a will or testamentary instrument) coming into operation, after the 16th of June, 1834, are rendered apportionable on the death of a life-tenant, according to the time which has elapsed

Chap. I.

from the commencement or last period of payment (as the case may be), *except* in cases in which it is expressly stipulated that no apportionment shall take place, and in the case of annual sums made payable in policies of assurance (ss. 2, 3).

This Act is still in force, but has been superseded by the wider provisions of the Apportionment Act, 1870. For the decisions on the earlier Act, see *Lewin* on Apportionment, Part II.

Apportionment Act, 1870.

The Apportionment Act, 1870 (33 & 34 Vict. c. 35), provides that all 'rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly' (s. 2); but the Act does not render apportionable any annual sums made payable in policies of assurance of any description (s. 6); and it does not extend to any case in which it is expressly stipulated that no apportionment shall take place (s. 7).

The apportioned part of a continuing rent, annuity, dividend, or other periodical payment, is payable or recoverable when the 'entire portion' of which it forms part becomes due and payable, and not before; and the apportioned part of a rent, annuity, or other periodical payment, determined by death or otherwise, is payable or recoverable when the next 'entire portion' would have been payable if it had not so determined, and not before (s. 3).

The life-tenant's personal representatives have the same remedies at law and in equity for recovering such apportioned parts when payable (allowing proportionate parts of all just allowances) as they would have had for recovering the 'entire portions' if entitled thereto: except that in the case of an entire or continuing rent,

they must resort not to the tenants or persons liable to pay the 'entire portion,' but to the remainderman or other person entitled to recover and receive it (s. 4): see *Bulkeley* v. *Stephens*, (1896) 2 Ch. at p. 249.

'Rents.' In the construction of the Act, 'Rents' include rent service, rentcharge, and rent seck, and also tithes, and all periodical payments or renderings in lieu of or in the nature of rent or tithe; 'Annuities' include salaries and pensions; and 'Dividends' include all payments made by the name of dividend, bonus or otherwise, out of the revenue of trading or other public companies, divisible between the members, whether usually made or declared at any fixed times or otherwise; such divisible revenue being deemed to have accrued by equal daily increment during and within the period for or in respect of which the payment is declared or expressed to be made; but 'dividend' does not include payments in the nature of a return or reimbursement of capital (s. 5): see *Re Griffith*, 12 Ch. D. 655.

'Annuities.'

'Dividends.'

Effect of Act. The Act applies whether the settlement came into operation before or after the passing of the Act: *Lawrence* v. *Lawrence*, 26 Ch. D. 795; *Patching* v. *Barnett*, 43 L. T. 50; and (if not excluded by the settlement) makes current rents, dividends, or other periodical income accruing at the life-tenant's death, apportionable as between his personal representatives and the next life-tenant or remainderman; *Re Cline*, 18 Eq. 213 (settled land); *Pollock* v. *Pollock*, 18 Eq. 329 (settled legacy); *Lawrence* v. *Lawrence*, 26 Ch. D. 795 (settled residue).

Interest on a mortgage is apportionable in the same way, even where only made payable in a lump sum at the mortgagor's death: *Re Lewis*, (1907) 2 Ch. 296.

The Act does not apply to income accruing at the date of the settlement, if expressly included therein; so that where shares are settled with the accruing

Chap. I.

dividend, without any provision for capitalizing it, the whole of such dividend belongs to the life-tenant: *Re Lysaght*, (1898) 1 Ch. 115.

Exclusion of Act.

The 7th section (which excludes the Act where it is expressly stipulated that no apportionment shall take place) is in substantially the same words as the 3rd section of the Act of 1834, so that decisions on the last-mentioned section appear to be in point.

A mere inference collected from the general terms of the settlement is not sufficient to exclude the Act: in order to have that effect, the terms of the gift must be so clear as necessarily to exclude apportionment: see *Tyrrell* v. *Clark*, 2 Dr. 86 (a case on the Act of 1834); *Re Lysaght*, (1898) 1 Ch. at p. 119; and see cases, *post*, p. 24.

A provision in a company's articles of association that any dividend shall be deemed to accrue and fall due on the day on which it is declared and not before, does not exclude the Act: *Re Oppenheimer*, (1907) 1 Ch. 399; and *quære* whether the Act can be excluded by a stipulation not contained in the settlement: *Ib.* at p. 401; but see *Clive* v. *Clive*, Kay, 600, which was explained in *Wright* v. *Tuckett*, 1 J. & H. 266, as turning on the peculiar wording of the deed of settlement in that case.

Dividends.

The Act applies to dividends of any public company: *Re Griffith*, 12 Ch. D. 655; including any company registered under the Companies Act, 1862; *Re Lysaght*, (1898) 1 Ch. 115.

By reason of the extended meaning given to 'dividends' by the interpretation clause (sect. 5), a quinquennial bonus or division of profits on shares in a life assurance company is apportionable: *Re Griffith*, 12 Ch. D. 655.

Partnership profits.

Profits of a private business or partnership are not

apportionable under the Act (*Jones* v. *Ogle*, 8 Ch. 192), but must be taken as having accrued entirely at the end of the period for which they are declared and not before: *Browne* v. *Collins*, 12 Eq. 586; *Lambert* v. *Lambert*, 22 W. R. 359; and if the life-tenant dies before the expiration of that period, they belong to the next life-tenant or remainderman then in possession: *Re Cox*, 9 Ch. D. 159. Delay in ascertaining the profits does not affect the rights of the parties interested: *Browne* v. *Collins*, 12 Eq. 586; but where the partners have power to capitalize profits, there may be a question whether the omission to divide the profits is due to an intention to capitalize: see *Straker* v. *Wilson*, 6 Ch. 503; and as to interest on capital, see *ante*, p. 19.

Accruing income.

The Act only applies to accruing income; so that rent payable in advance, which has accrued due at the life-tenant's death, seems not to be apportionable, though the period in respect of which it is paid has not then expired: see *Ellis* v. *Rowbotham*, (1900) 1 Q. B. 740.

So, dividends not expressed to be paid in respect of any particular period, if declared before the life-tenant's death, although not payable till afterwards, seem not to be apportionable, but belong to his estate, in the absence of any provision to the contrary: see *Wright* v. *Tuckett*, 1 J. & H. 266; and it is conceived that by virtue of sect. 5 of the Act, dividends declared after the life-tenant's death, in respect of a period expiring in his lifetime, stand on the same footing: see *Re Oppenheimer*, (1907) 1 Ch. 399.

Special provisions.

A provision in a settlement entitling the remainderman to dividends in arrear at the life-tenant's death, was held not to apply to extraordinary arrears occasioned by a Revolution: *Hachett* v. *Pattle*, 6 Madd. 4.

As to apportionment between the life-tenant under a

Chap. I.

Apportionment between specific and residuary legatees.

specific devise or bequest and the residuary legatee, (1) in respect of rents and dividends accruing at the testator's death, see *Capron* v. *Capron*, 17 Eq. 288; *Pollock* v. *Pollock*, 18 Eq. 329; *Constable* v. *Constable*, 11 Ch. D. 681; and (where the Act is excluded) *Bates* v. *Mackinley*, 31 Beav. 280 (a case before the Act); and (2) in respect of dividends accrued before the death but not payable till afterwards, see *Lock* v. *Venables*, 27 Beav. 598; *De Gendre* v. *Kent*, 4 Eq. 283.

And as to exclusion of apportionment in such cases by express stipulation, see *Unwin* v. *Eglyn*, W. N. 1866, 268; *Jones* v. *Ogle*, 8 Ch. at p. 196; *Re Lysaght*, (1898) 1 Ch. 115; *Re Meredith*, 67 L. J. Ch. 409; *Re Oppenheimer*, (1907) 1 Ch. 399.

Change of investment.

The Apportionment Act does not apply to a change of investment, so that the income accruing on the new investment at the date of purchase is not apportionable.

Thus, where a fund was settled by will with interest to be paid to the life-tenant until investment, she was held entitled to the whole of the accruing dividends of the stocks purchased, in addition to the interest of the fund up to the date of investment: *Re Clarke*, 18 Ch. D. 160; and see *post*, p. 49.

But where the sanction of the Court is required to a change of investment, it seems that the order should in general contain a provision to prevent the life-tenant receiving income twice over; see *Re Ingram*, 11 W. R. 980.

CHAPTER II.

TIMBER AND MINERALS.

Timber.

Timber growing on settled land forms part of the inheritance, which a life-tenant cannot in general take without express words in the settlement: *Plymouth* v. *Archer*, 1 Bro. C. C. 159; *Re Llewellin*, 37 Ch. D. 317; and even dead trees, so long as they remain attached to the soil, form part of the inheritance: *Re Ainslie*, 30 Ch. D. 485.

Oak, ash, and elm, of twenty years growth and upwards, are timber by the general law, and certain other trees, such as beech and birch, are in some places timber by the custom of the country: see *Honywood* v. *Honywood*, 18 Eq. at p. 309; *Re Harrison*, 28 Ch. D. at p. 227; *Dashwood* v. *Magnaic*, (1891) 3 Ch. 306; *Pardoe* v. *Pardoe*, 82 L. T. 547.

Impeachment of waste.

In practice, the life-tenant's rights depend to a great extent on the question whether he is impeachable for waste, the rule being that he is impeachable for waste unless the contrary is provided by the settlement: see *Lowndes* v. *Norton*, 33 L. J. Ch. 583; *Re Ridge*, 31 Ch. D. 504; *Pardoe* v. *Pardoe*, 82 L. T. 547.

Life-tenant impeachable.

A life-tenant impeachable for waste may not in general cut or take the proceeds of timber, whether his estate be legal or equitable: *Whitfield* v. *Bewit*, 2 P. Wms. 240; *Lee* v. *Alston*, 1 Bro. C. C. 194; *Denton* v. *Denton*, 7 Beav. 388; *Honywood* v. *Honywood*, 18 Eq. 306; *Pardoe* v. *Pardoe*, 82 L. T. 547; although the timber be decaying: *Perrot* v. *Perrot*, 3 Atk. 94; nor

Chap. II.

may be, in general, cut timber trees under twenty years of age: *Honywood* v. *Honywood*, 18 Eq. 306.

Exceptions:—

Timber estate.

(1) He may cut timber grown in woods periodically, in the regular course of management established by local custom or long usage on the estate, and is entitled to the proceeds: *Cowley* v. *Wellesley*, 1 Eq. 656; *Honywood* v. *Honywood*, 18 Eq. 306; although only life-tenant of a term: *Dashwood* v. *Magniac*, (1891) 3 Ch. 306; see *Bagot* v. *Bagot*, 32 Beav. at p. 517.

Thinnings.

(2) He may cut timber trees under twenty years of age, in due course of cultivation for the purpose of preserving or allowing the growth of the remaining trees, and is entitled to the proceeds: *Honywood* v. *Honywood*, 18 Eq. 306; see *Bagot* v. *Bagot*, 32 Beav. at p. 518; *Dashwood* v. *Magniac*, (1891) 3 Ch. at p. 330; but he is not entitled to the proceeds of timber felled for this purpose: *Cowley* v. *Wellesley*, 1 Eq. 656.

Repairs and botes.

(3) He may cut timber for repairs and botes: *Bewick* v. *Whitfield*, 3 P. Wms. 268; but cannot sell it to recoup himself the cost of repairs: *Gower* v. *Eyre*, Coop. G. 156.

Timber for improvements.

(4) He may 'cut down and use any timber or trees not planted or serving for shelter or ornament,' for the purpose of effecting any improvement under the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114, s. 34).

(5) He may 'cut down and use timber and other trees not planted or left standing for shelter or ornament,' for the purpose of executing, maintaining, and repairing any improvement authorized by the Settled Land Act, 1882 (45 & 46 Vict. c. 38, s. 29).

Timber ripe and fit for cutting.

(6) He is entitled to one-fourth part of the net proceeds of timber which, being 'ripe and fit for cutting,' is cut and sold under the Settled Land Act, 1882, with the consent of the trustees of the settlement or by order of the Court; while the remaining three-fourth parts of

such proceeds have to be set aside as capital money: 45 & 46 Vict. c. 38, s. 35. But this section does not entitle the life-tenant to any part of the value of growing timber sold with the estate: see *Re Llewellin*, 37 Ch. D. 317.

Other trees.

A life-tenant impeachable for waste is in general entitled to cut and take the proceeds of all trees that are not timber, unless planted for ornament or protection: *Honywood* v. *Honywood*, 18 Eq. 306; see *Dashwood* v. *Magnaic*, (1891) 3 Ch. at p. 351.

Fir trees.

Thus, he has been held entitled to thinnings of fir trees under twenty years of age: *Pidgeley* v. *Rawling*, 2 Coll. 275; see *Birch Wolfe* v. *Birch*, 9 Eq. 686; and

Underwood.

underwood: *Pigot* v. *Bullock*, 1 Ves. Jun. 479; *Butler* v. *Borton*, 5 Madd. 40; provided it be of sufficient growth: *Brydges* v. *Stephens*, 6 Madd. 279; but not stools of underwood: *Honywood* v. *Honywood*, 18 Eq. 306.

Trust for sale.

So, where plantations of trees other than timber are settled by way of trust for sale, and the intermediate rents are applicable as income, he seems entitled to the proceeds of trees cut by the trustees in the regular course of management: see *Re Harrison*, 28 Ch. D. 220.

S. L. Act, 1882, s. 28.

But he may not cut down, except in proper thinning, any trees planted as an improvement under the Settled Land Act, 1882 (45 & 46 Vict. c. 38, s. 28).

Windfalls.

Timber blown down during the tenancy of a life-tenant impeachable for waste, belongs in general to the owner for the time being of the first vested estate of inheritance, whether in fee or in tail: *Bewick* v. *Whitfield*, 3 P. Wms. 267; *Honywood* v. *Honywood*, 18 Eq. 306; see *Re Harrison*, 28 Ch. D. at p. 228.

But the life-tenant is entitled to such of the trees blown down as he might properly have cut; and the proceeds of the remainder have to be invested, and the interest produced thereby paid to the life-tenant:

Chap. II.

Bateman v. *Hotchkin*, 31 Beav. 486; see *Bagot* v. *Bagot*, 32 Beav. at p. 526; *Re Harrison*, 28 Ch. D. at p. 228.

Extraordinary windfalls.

The Court will, if possible, prevent accident from interfering with the rights of the parties. Thus, where larch plantations were settled by way of trust for sale, the intermediate rents being given as income, and the regular course of management was to thin annually and apply the proceeds as income, it was held that the proceeds of trees blown down by extraordinary gales did not belong to the life-tenant, but must (after deducting the expense of replanting) be invested, such an annual sum being paid to him out of income, and (if necessary) capital, as would be equivalent to the average income of the plantations: *Re Harrison*, 28 Ch. D. 220.

Improper cutting.

Timber improperly cut by a life-tenant impeachable for waste belongs in general to the owner for the time being of the first vested estate of inheritance, *Whitfield* v. *Bewit*, 2 P. Wms. 240; *Bagot* v. *Bagot*, 32 Beav. 509; unless cut by collusion with him: *Garth* v. *Cotton*, 1 Ves. Sen. 524, 546; *Honywood* v. *Honywood*, 18 Eq. 306; and so does timber cut by a trespasser: *Bewick* v. *Whitfield*, 3 P. Wms. 267.

A life-tenant guilty of improper cutting or thinning is not allowed to derive any advantage from his own wrong, and therefore gets no interest on the proceeds during his life: see *Bateman* v. *Hotchkin*, 31 Beav. 486; *Bagot* v. *Bagot*, 32 Beav. 509; *Seagram* v. *Knight*, 2 Ch. 628; *Re Harrison*, 28 Ch. D. at p. 228.

Proceeds of improper cutting.

The proceeds of timber improperly cut may in general be claimed at once by the owner of the first vested estate of inheritance: *Castlemaine* v. *Craven*, 2 Eq. Cas. Abr. 758; *Lee* v. *Alston*, 3 Bro. C. C. 38; *Bagot* v. *Bagot*, 32 Beav. 509; *Seagram* v. *Knight*, 2 Ch. at p. 632; see *Ferrand* v. *Wilson*, 4 Ha. at p. 382; notwithstanding the existence of an intervening life-estate without

impeachment of waste: see *Pigot* v. *Bullock*, 1 Ves. Jun. 479; *Gent* v. *Harrison*, Joh. at p. 524; *Re Barrington*, 33 Ch. D. at p. 527; and notwithstanding the possibility of his estate being defeated by some intermediate estate coming into existence: *Lee* v. *Alston*, 3 Bro. C. C. 38; see *Gent* v. *Harrison*, Joh. at p. 524. The dictum to the contrary in *Bagot* v. *Bagot*, 32 Beav. at p. 523, has been disapproved: see *Re Cavendish*, W. N. 1877, 198; and see *Dare* v. *Hopkins*, 2 Cox, 110, where the decision seems to have turned on a clause in the will giving the rents and profits to the next in remainder until the intermediate estate should come into existence.

If, however, the life-tenant is himself the owner of the next vested estate of inheritance, the Court will not permit him to take advantage of his own wrong, but withholds the proceeds so long as there is a possibility of any intermediate estate coming into existence, and requires the income thereof to be accumulated for the benefit of the persons entitled to the inheritance at his death: *Williams* v. *Bolton*, 1 Cox, 72; *Powlett* v. *Bolton*, 3 Ves. 374; but where the cuttings were trivial the Court refused to interfere: see *Birch Wolfe* v. *Birch*, 9 Eq. 683.

Cutting in due course of management.

Where timber is cut by the life-tenant without authority, but in due course of management, and his act is adopted by the Court, the income of the proceeds is allowed to be received by the life-tenant: *Bagot* v. *Bagot*, 32 Beav. at p. 522; see *Gent* v. *Harrison*, Joh. at p. 523; *Lowndes* v. *Norton*, 6 Ch. D. 139; and if a subsequent life-tenant without impeachment of waste comes into possession, the proceeds of such of the timber as he might have cut, belong to him: *Gent* v. *Harrison*, Joh. 517; *Lowndes* v. *Norton*, 6 Ch. D. 139.

Cutting under order of Court.

Before the Settled Land Act, 1882, came into operation, the Court would not order timber to be cut, on the

Chap. II.

application of the life-tenant, merely because it was ripe for cutting, but only where it was shown to be for the benefit of the inheritance, as where it was decaying or injuring the growth of other timber: *Hussey* v. *Hussey*, 5 Madd. 44; *Tooker* v. *Annesley*, 5 Sim. at p. 240; *Tollemache* v. *Tollemache*, 1 Ha. 456; *Seagram* v. *Knight*, 2 Ch. 628; see *Peters* v. *Blake*, 6 L. J. Ch. 157.

Where timber was cut by order of the Court, the usual course was to invest the proceeds and give the life-tenant the income: *Tooker* v. *Annesley*, 5 Sim. 235; *Lygon* v. *Beauchamp*, 6 L. J. Ch. 158; *Bishop* v. *Bishop*, 10 L. J. Ch. 302; *Dickin* v. *Hamer*, 1 Dr. & Sm. 284; *Honywood* v. *Honywood*, 18 Eq. 306 (not following *Bewick* v. *Whitfield*, 3 P. Wms. 267): see *Mildmay* v. *Mildmay*, 4 Bro. C. C. 76; *Hartley* v. *Pendarves*, (1901) 2 Ch. at p. 500; the capital going to the first life-tenant without impeachment of waste, who became entitled in possession: *Phillips* v. *Barlow*, 14 Sim. 263; see *Waldo* v. *Waldo*, 12 Sim. at p. 113; *Jodrell* v. *Jodrell*, 20 L. T. 349; or (if none) to the owner of the first vested estate of inheritance when the life estate fell in: *Field* v. *Brown*, 27 Beav. 90; *Honywood* v. *Honywood*, 18 Eq. 306.

Trustees' cuttings.

If timber, decaying or injuring the growth of other timber, is cut by trustees without special power, and their act is adopted by the Court, the proceeds are applicable as if the trees had been cut by order of the Court, the life-tenant taking the income: *Waldo* v. *Waldo*, 7 Sim. 261; and the capital going to the first life-tenant without impeachment of waste: *Waldo* v. *Waldo*, 12 Sim. 107, or (if none) to the owner of the first vested estate of inheritance.

But where trustees with power to cut timber for payment of debts cut more than was necessary, the proceeds were ordered to be invested and to go according to the uses of the settlement: see *Tully* v. *Tully*, cited 3 Ves. 378.

Life-tenant without impeachment.

A life-tenant without impeachment of waste is entitled (subject to the qualifications mentioned below) to cut and take the proceeds of timber: *Partridge* v. *Pawlet*, 1 Atk. 467; see *Williams* v. *Williams*, 15 Ves. at p. 425; including young trees, provided they are fit for the purposes of timber: *Smythe* v. *Smythe*, 2 Sw. 251; see *Piers* v. *Piers*, 1 Ves. Sen. 521; *Potts* v. *Potts*, 3 L. J. O. S. Ch. 176; and ornamental trees, if planted for the purpose of profit: *Halliwell* v. *Phillips*, 4 Jur. N. S. 607; or (*semble*) if planted by a person who was only life-tenant, unless afterwards left standing by some one having the inheritance: see *Wombwell* v. *Bellasyse*, 6 Ves. 110 b. (ed. 1827).

The life-tenant of a term limited without impeachment of waste seems to stand on the same footing: see *Bridges* v. *Stephens*, 2 Sw. 150 n.

The existence of a prior term of years seems not to affect the rights of the life-tenant if he is in possession: see *Wolf* v. *Hill*, 2 Sw. 149 n. But where the trustees of the term are in possession, it seems he cannot cut timber without leave of the Court: see *Aspinwall* v. *Leigh*, 2 Vern. 218.

Windfalls.

A life-tenant without impeachment of waste is also entitled to windfalls, and to timber wrongfully cut by strangers during his life-tenancy: see *Anon.*, Mos. 237; *Tooker* v. *Annesley*, 5 Sim. at p. 240; *Re Barrington*, 33 Ch. D. at p. 527; and to the proceeds of timber cut by direction of the Court: *Lovat* v. *Leeds*, 2 Dr. & Sm. 75; and where a settled estate was subject to an overriding trust for sale for payment of debts, and the trustees cut and sold timber for that purpose, the life-tenant was held entitled to a charge on the estate for the amount raised by the sale: *Davies* v. *Wescomb*, 2 Sim. 425.

Cutting by Court.

Trustees' cuttings.

As to his rights in respect of timber cut during a previous life-tenancy, see *ante*, pp. 28, 29, 30.

Chap. II.

The rights of a life-tenant without impeachment of waste are, however, subject to the following qualifications:—

Ornamental timber.

(1) He may not cut timber or other trees planted or left standing by a former absolute owner for ornament or shelter of the mansion-house or park, as that is equitable waste which is not allowed in Equity, nor, since the Judicature Act, 1873, at Law (see 36 & 37 Vict. c. 66, s. 25 (3); *Bedoyere* v. *Greville-Nugent*, 25 L. R. Ir. 143), unless an intention to confer the right to commit such waste expressly appears by the settlement: *Packington's case*, 3 Atk. 215; *O'Brien* v. *O'Brien*, Amb. 107; *Day* v. *Merry*, 16 Ves. 375; *Lansdowne* v. *Lansdowne*, 1 Madd. 116; *Coffin* v. *Coffin*, Jac. 70; *Wombwell* v. *Bellasyse*, 6 Ves. 110 a. (ed. 1827); *Newdigate* v. *Newdigate*, 1 Sim. 131; 8 Bli. N. S. 734; *Wellesley* v. *Wellesley*, 6 Sim. 497; *Morris* v. *Morris*, 15 Sim. 505; 16 L. J. Ch. 201; *Ashby* v. *Hincks*, 58 L. T. 557. This restriction applies even though the trees are decaying or injuring the growth of other trees: *Lushington* v. *Boldero*, 6 Madd. 149; *Bedoyere* v. *Greville-Nugent*, 25 L. R. Ir. 143; it being a question of fact in each case, not whether the trees *are* ornamental, but whether they were planted or left standing for ornament or shelter: *Downshire* v. *Sandys*, 6 Ves. 107; *Marker* v. *Marker*, 9 Ha. 1; see *Wombwell* v. *Bellasyse*, 6 Ves. 110 a. (ed. 1827); *Weld Blundell* v. *Wolseley*, (1903) 2 Ch. 664. The intention of the settlor alone is regarded, and has not unfrequently to be collected from his conduct: see *Lushington* v. *Boldero*, 6 Madd. 149; *Micklethwait* v. *Micklethwait*, 1 De G. & J. 504; *Halliwell* v. *Phillips*, 4 Jur. N. S. 607; *Ford* v. *Tynte*, 2 D. J. & S. at p. 131.

Saplings.

(2) He may not cut saplings to the extent of spoliation, as that also is equitable waste: *O'Brien* v. *O'Brien*, Amb. 107; *Lansdowne* v. *Lansdowne*, 1 Madd. 116; see *Potts* v. *Potts*, 3 L. J. O. S. Ch. 176; *Aston* v. *Aston*, 1 Ves. Sen. 264; *Halliwell* v. *Phillips*, 4 Jur. N. S. 607.

(3) He is not entitled to the proceeds of growing timber sold with the estate under a power of sale: *Doran* v. *Wiltshire*, 3 Sw. 699; *Wolf* v. *Hill*, 2 Sw. 149 n.; see *Waldo* v. *Waldo*, 12 Sim. at p. 112; and see *ante*, p. 27. Timber sold with estate.

(4) He may not cut down, except in proper thinning, any trees planted as an improvement under the Settled Land Act, 1882: 45 & 46 Vict. c. 38, s. 28. Improvements under S. L. Act.

If a life-tenant without impeachment of waste cuts ornamental timber wrongfully, the Court will not allow him to gain any benefit from it, but directs the proceeds to be accumulated for the benefit of the succeeding owners of the estate: *Lansdowne* v. *Lansdowne*, 1 Madd. 116; *Wellesley* v. *Wellesley*, 6 Sim. 497; *Lushington* v. *Boldero*, 15 Beav. 1. Proceeds of wrongful cutting.

In one case, the remainderman in fee was held entitled, notwithstanding the possibility of intervening remainders arising: *Butler* v. *Kynnersley*, 8 L. J. O. S. Ch. 67; but the modern decisions are opposed to this: see *Lushington* v. *Boldero*, 15 Beav. at p. 2; *Honywood* v. *Honywood*, 18 Eq. at p. 311; and see *Rolt* v. *Somerville*, 2 Eq. Cas. Abr. 759.

If, however, the timber cut is such as the Court would have directed to be cut, in order to preserve and improve the remaining ornamental timber (see *Ford* v. *Tynte*, 2 D. J. & S. 127), the life-tenant is entitled to the proceeds: *Baker* v. *Sebright*, 13 Ch. D. 179; see *Bubb* v. *Yelverton*, 10 Eq. 465.

The life-tenant's rights in respect of timber may be enlarged or restricted by special provisions in the settlement, but a power of management does not enlarge his ordinary rights: see *Pardoe* v. *Pardoe*, 82 L. T. 547. Special provisions.

An express power for the life-tenant to cut timber for repairs has been held not to affect his right to periodical cuttings of a beech timber estate: *Dashwood* v. *Magniac*, (1891) 3 Ch. 306. Express power to cut.

Chap. II.

So, liberty to cut timber and underwood for use but not to sell, was held not to restrict the life-tenant's common law right to underwood: *Pigot* v. *Bullock*, 1 Ves. Jun. 479.

A power to cut timber at seasonable times, was held not to extend to saplings or trees planted or left for ornament: *Chamberlyne* v. *Dummer*, 1 Bro. C. C. 166; 3 Bro. C. C. 549.

A power to cut and sell for his own use, does not entitle the life-tenant to the proceeds of growing timber sold with the estate under the powers of the Settled Land Act, 1882: *Re Llewellin*, 37 Ch. D. 317.

Excepted timber.

An express exception of timber in specified park avenues and woods, does not affect the life-tenant's rights as to other timber: see *Newdigate* v. *Newdigate*, 1 Sim. 131; 8 Bli. N. S. 734.

Voluntary waste excepted.

A life-tenant without impeachment of waste, except voluntary waste, may cut in due course of management and take the proceeds of timber not planted or left for ornament or shelter: *Vincent* v. *Spicer*, 22 Beav. 380; see *Micklethwait* v. *Micklethwait*, 1 De G. & J. 504; and is entitled to the income of proceeds of timber cut by order of the Court: *Wickham* v. *Wickham*, 19 Ves. 419.

But if he cuts timber wrongfully in collusion with the ultimate remainderman in fee, and divides the proceeds with him, where there is an intermediate limitation in tail to an unborn person who afterwards comes into existence, the latter may recover the proceeds: *Garth* v. *Cotton*, 1 Ves. Sen. 524, 546.

Power for trustees to cut.

A special power for trustees to cut, does not enlarge the life-tenant's power: *Downshire* v. *Sandys*, 6 Ves. 107.

On the other hand, a direction that timber or wood shall be used for repairs or otherwise for the benefit of the estate or sold and applied as personalty, has been held not to affect the life-tenant's right to underwood: *Butler* v. *Borton*, 5 Madd. 40.

But where a life-tenant without impeachment of waste takes subject to a power for the trustees to cut timber for payment of incumbrances, he cannot cut timber during the continuance of the power: *Briggs* v. *Oxford*, 1 D. M. & G. 363; *Kekewich* v. *Marker*, 3 Mac. & G. 311.

Trust for sale.

Where land is devised upon trust for sale and reinvestment in land, to be settled to the use of a person for life without impeachment of waste, he is not entitled to cut timber on the land devised, even if the rents and profits until sale are given to the persons who would be entitled to the purchased lands: *Plymouth* v. *Archer*, 1 Bro. C. C. 159.

Trust to invest in land.

As to how far a trust to invest personalty in land to be settled to the use of one for life without impeachment of waste is properly executed by the purchase of a timber estate, see *Burges* v. *Lamb*, 16 Ves. 174; and see *Re Jones*, 1 Jur. N. S. 817.

Remainderman's rights.

Although a remainderman has no right to cut timber, yet in one case the Court gave leave to a remainderman in fee to cut timber for the payment of legacies, there being a gift over in default of payment within a limited time: *Claxton* v. *Claxton*, 2 Vern. 152; and see *Mildmay* v. *Mildmay*, 4 Bro. C. C. 76.

Receiver.

Where timber is cut improperly, the remainderman is entitled to have the rents impounded until the inheritance is recouped the amount: *Briggs* v. *Oxford*, 3 W. R. 588.

Set-off.

In taking the account, the life-tenant is not entitled to set off the value of improvements made by him: *Lowndes* v. *Norton*, 33 L. J. Ch. 583; but where the life-tenant was also the owner of the first vested estate of inheritance, and had power to cut timber for repairs, improvements effected by him were allowed to be set off against the proceeds of timber improperly cut: *Birch Wolfe* v. *Birch*, 9 Eq. 683.

Chap. II.

Delay.

Where it was found impossible to take the account accurately, the life-tenant was charged arbitrarily: *Leeds* v. *Amherst*, 20 Beav. 239; but where there has been delay in taking proceedings, the Court deals liberally with him: see *Bagot* v. *Bagot*, 32 Beav. 509.

Limitations.

The remainderman's action must be brought within six years of the wrongful cutting, or of his attaining twenty-one: *Seagram* v. *Knight*, 2 Ch. 628; *Higginbotham* v. *Hawkins*, 7 Ch. 676; *Dashwood* v. *Magniac*, (1891) 3 Ch. at p. 387; unless the cutting amounts to equitable waste, in which case time does not begin to run against the remainderman until the life-tenant's death: *Leeds* v. *Amherst*, 2 Ph. 117; *Dashwood* v. *Magniac*, (1891) 3 Ch. at p. 386; and see *Birch Wolfe* v. *Birch*, 9 Eq. 683.

Minerals.

Minerals stand in a similar position to timber, inasmuch as being imbedded in the soil, they form part of the inheritance: see *Campbell* v. *Wardlaw*, 8 App. Cas. at pp. 645, 649.

Accordingly, the rights of a life-tenant in respect of minerals commonly depend on the question whether he is impeachable for waste, just as in the case of timber: see *Re Ridge*, 31 Ch. D. 504; and see *ante*, p. 25.

Life-tenant impeachable.

A life-tenant impeachable for waste may not open mines or clay pits, or get stone from unopened quarries (except for repairs or statutory improvements): *Whitfield* v. *Bewit*, 2 P. Wms. 240; *Viner* v. *Vaughan*, 2 Beav. 466; *Ferrand* v. *Wilson*, 4 Ha. at p. 388; even where the mines are expressly mentioned in the settlement: *Whitfield* v. *Bewit*, 2 P. Wms. 242; *Daly* v. *Beckett*, 24 Beav. at p. 120; but see *Dashwood* v. *Magniac*, (1891) 3 Ch. at p. 360.

Open mines.

But he may work and take the proceeds of mines open at the date of the settlement, unless a contrary intention is shown: *Clavering* v. *Clavering*, 2 P. Wms.

388; *Viner* v. *Vaughan*, 2 Beav. 466; see *Plymouth* v. *Archer*, 1 Bro. C. C. 159; *Bagot* v. *Bagot*, 32 Beav. 509; *Campbell* v. *Wardlaw*, 8 App. Cas. at p. 645; *Dashwood* v. *Magniac*, (1891) 3 Ch. at pp. 327, 360; *Re Chaytor*, (1900) 2 Ch. 804; and may open new pits and shafts to follow the same vein of coal: *Clavering* v. *Clavering*, 2 P. Wms. 388; see *Elias* v. *Snowdon Slate Quarries Co.*, 4 App. Cas. at p. 466; unless separated from the open mines by land belonging to a stranger: *Re Maynard*, (1899) 2 Ch. 347.

A new seam of coal in an old mine has been treated as an open mine: see *Spencer* v. *Scurr*, 31 Beav. 334; *Chaytor* v. *Trotter*, 87 L. T. 33; but see *Re Chaytor*, (1900) 2 Ch. 804; so, the whole of the gravel in the waste lands of a manor is treated as one mine, and each gravel pit as a fresh pit in the mine: see *Cowley* v. *Wellesley*, 1 Eq. at p. 659.

The question whether a mine is 'open' depends on the intention of the settlor, which may be evidenced by his declarations or acts in dealing with the estate prior to the settlement: *Chaytor* v. *Trotter*, 87 L. T. 33; and a power given to the settlement trustees to work seems to be evidence of such intention: *Ib.*

It seems that a mine or quarry may be open although never worked for commercial profit; but the fact of stone having been dug from a quarry merely for repairing the mansion-house would seem not to make it an open quarry: see *Elias* v. *Snowdon Slate Quarries Co.*, 4 App. Cas. at p. 465.

Abandoned mines.

Mines which have been discontinued for twenty or thirty years in consequence of not being remunerative, may (it seems) be still regarded as open; although mines abandoned by the settlor for a long period for the advantage of the inheritance, would probably be treated as unopened mines: *Bagot* v. *Bagot*, 32 Beav. 509; *Re Chaytor*, (1900) 2 Ch. 804; see *Viner* v. *Vaughan*, 2 Beav. 466; *Greville-Nugent* v. *Mackenzie*, (1900) A. C. 83.

Chap. II.

Improvement of Land Act, 1864, s. 34.

S. L. Act, 1882, s. 29.

The life-tenant may also get and work freestone, limestone, clay, sand and other substances either for the purpose of effecting any improvement under the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114, s. 34), or for the purpose of executing, maintaining, or repairing any improvement authorized by the Settled Land Act, 1882 (45 & 46 Vict. c. 38, s. 29).

Royalties of open mines.

A life-tenant impeachable for waste is in general entitled to the rents and royalties paid by tenants of mines open at the date of the settlement: see *Spencer* v. *Scurr*, 31 Beav. 334; *Re Ridge*, 31 Ch. D. at p. 508; and of brickfields then open: *Re North*, (1909) 1 Ch. 625; whether such rents and royalties are reserved by a lease granted by the settlor or arise under a yearly tenancy created by the trustees of the settlement: *Ib.*

His rights are the same where the settlement is by way of trust for sale, if the intermediate rents and profits are directed to go as income, and the sale is not unduly delayed: *Miller* v. *Miller*, 13 Eq. 263; *Greville-Nugent* v. *Mackenzie*, (1900) A. C. 83.

A similar decision was arrived at in one case where there was no such direction: see *Re Darnley*, (1907) 1 Ch. 159; but it seems difficult to reconcile this decision with *Wentworth* v. *Wentworth*, (1900) A. C. 163 (see *post*, p. 39), and with *Re Woods*, (1904) 2 Ch. 4, where the life-tenant was held to be entitled to only 3 per cent. interest on the value of the property.

Exceptions:—

S. E. Act, 1877, s. 4.

(1) If the rent is reserved by a lease granted under the powers of the Settled Estates Act, 1877, one-fourth part of the rent has to be set aside as capital: 40 & 41 Vict. c. 18, s. 4; see *Re Maynard*, (1899) 2 Ch. 347.

S. L. Act, 1882, s. 11.

(2) If the rent is reserved by a lease granted under the powers of the Settled Land Act, 1882, where the life-tenant is impeachable for waste in respect of minerals, three-fourth parts of the rent, and otherwise one-fourth

part thereof, must be set aside as capital money, and the residue of the rent goes as rents and profits, although the mines are already opened or in work, unless a contrary intention is expressed in the settlement: 45 & 46 Vict. c. 38, s. 11. But it has been held that a life-tenant impeachable for waste, having power to work open mines, is, for the purposes of this section, not impeachable for waste in respect of the minerals got from such mines, and is therefore entitled to three-fourths of the rent: *Re Chaytor*, (1900) 2 Ch. 804.

Royalties of mines opened since settlement.

Rents and royalties paid by tenants of mines opened since the date of the settlement do not in general belong to a life-tenant impeachable for waste, but are treated as capital, unless a contrary intention is shown in the settlement: see *Dickin* v. *Hamer*, 1 Dr. & Sm. 284; *Re Ridge*, 31 Ch. D. at p. 508. The fact of the settlor having opened mines in other parts of the settled estates has been held not to show such a contrary intention: *Campbell* v. *Wardlaw*, 8 App. Cas. 641.

Exceptions:—

Lease by settlor.

(1) If reserved by a lease granted by the settlor, or pursuant to a contract entered into by him, the royalties are income to which the life-tenant is entitled: *Cowley* v. *Wellesley*, 35 Beav. 638; *Re Kemeys Tynte*, (1892) 2 Ch. 211.

Lease under power.

(2) If reserved by a lease granted under a power in the settlement, the life-tenant is entitled to the royalties, in the absence of a provision to the contrary: *Daly* v. *Beckett*, 24 Beav. 114; *Cowley* v. *Wellesley*, 35 Beav. 638; see *Campbell* v. *Wardlaw*, 8 App. Cas. at p. 650; *Lonsdale* v. *Lowther*, (1900) 2 Ch. 687; unless the settlement is by way of trust for sale, in which case the life-tenant is only entitled to receive out of the rent and royalties a fair equivalent for the income which he would have received if the estate had been sold: *Wentworth* v. *Wentworth*, (1900) A. C. 163. No rule appears to have

Chap. II.

been laid down in the last-mentioned case as to the rate of interest to be allowed; but by analogy to the rule adopted in recent cases as to residuary personal estate, it would seem to be 3 per cent. on the estimated value: see *Re Woods*, (1904) 2 Ch. 4.

S. E. Act, 1877, s. 4.

(3) If the lease is granted under the powers of the Settled Estates Act, 1877, three-fourth parts of the rent have to be set aside as capital: 40 & 41 Vict. c. 18, s. 4: see *Re Maynard*, (1899) 2 Ch. 347.

S. L. Act, 1882, s. 11.

(4) If the lease is granted under the powers of the Settled Land Act, 1882, three-fourth parts of the rent have to be set aside as capital money, and the residue goes as rents and profits, unless a contrary intention is expressed in the settlement: 45 & 46 Vict. c. 38, s. 11; even where the settlement is by way of trust for sale: *Re Ridge*, 31 Ch. D. 504.

Improper working.

The proceeds of mines improperly opened by a life-tenant impeachable for waste, belong to the owner of the first vested estate of inheritance: see *Ferrand* v. *Wilson*, 4 Ha. at p. 388; *Bagot* v. *Bagot*, 32 Beav. at p. 522; *Re Barrington*, 33 Ch. D. at p. 527; and the life-tenant, being treated as a wrong-doer, is not allowed the income of the proceeds: *Bagot* v. *Bagot*, 32 Beav. 509; see *ante*, p. 28.

Life-tenant without impeachment.

A life-tenant without impeachment of waste may open mines and take the produce, and is in general entitled to rents and royalties received under mining leases: see *Re Ridge*, 31 Ch. D. at p. 508.

S. E. Act, 1877, s. 4.

But if the lease is granted under the powers of the Settled Estates Act, 1877, one-fourth part of the rent has to be set aside as capital: 40 & 41 Vict. c. 18, s. 4.

S. L. Act, 1882, s. 11.

So, if the lease is granted under the powers of the Settled Land Act, 1882, he is only entitled to three-fourth parts of the rent: the remaining one-fourth part having to be set aside as capital money, unless a

contrary intention is expressed in the settlement: 45 & 46 Vict. c. 38, s. 11.

Minerals taken by trespassers.

He is also entitled to compensation recovered from trespassers for minerals taken from the settled land during his life-tenancy: *Re Barrington*, 33 Ch. D. 523.

Mines sold with estate.

He is not entitled to any part of the proceeds of mines sold with the estate: see *Re Robinson*, (1891) 3 Ch. at p. 134; except in certain cases where they are taken compulsorily: see *post*, pp. 44, 46.

CHAPTER III.

PROCEEDS OF SALE.

Chap. III.

Freeholds and copyholds.

WHERE settled freeholds or copyholds of inheritance are sold by trustees under a power of sale, the proceeds are capital which must be invested, the life-tenant being only entitled to the income of the investments.

A deposit received by the trustees on a contract for sale, and forfeited on account of the purchaser's failure to complete, stands on the same footing: *Shrewsbury* v. *Shrewsbury*, 18 Jur. 397.

Leaseholds.

The proceeds of settled leaseholds, not forming part of residue, stand on a different footing, the term being a wasting property which the life-tenant is entitled to exhaust if he lives long enough.

Accordingly, where settled leaseholds were sold by trustees without authority, and the life-tenant survived the term, she was held entitled to the proceeds although she had joined with the trustees in executing a declaration of trust of them and only received the dividends during her life: *Phillips* v. *Sarjent*, 7 Ha. 33.

And where leaseholds, settled without any power of sale, were sold by the Court, the life-tenant was held entitled to receive, out of the income and capital of the proceeds, an annuity of such an amount as would exhaust the fund at the end of the term, by analogy to the practice under sect. 74 of the Lands Clauses Consolidation Act, 1845: *Re Lingard*, (1908) W. N. 107.

But where long leaseholds were sold by order of the Court on account of their being unproductive and incapable of beneficial enjoyment by the life-tenant, the

proceeds were treated as capital: see *Lonsdale* v. *Berchtoldt*, 3 K. & J. 185.

In the case of leaseholds settled subject to an overriding trust for renewal, and sold because renewal has become impossible, the proceeds are capital of which the life-tenant is only entitled to the income: see *Maddy* v. *Hale*, 3 Ch. D. at p. 340.

As to leaseholds forming part of residue, see Chap. X.

As to proceeds of timber and minerals, see Chap. II., and *post*, pp. 44, 46.

Trust for sale: delay.

Where delay in executing a trust for sale results in an increased price being obtained at the expense of income, the life-tenant seems to be entitled to compensation out of the purchase-money: *Hibbert* v. *Cooke*, 1 Sim. & St. 552; *Re Burn*, W. N. 1879, 26.

Lands Clauses Act, ss. 69—71.

Where settled land is purchased or taken under the powers of the Lands Clauses Consolidation Act, 1845, any sum paid by the promoters as purchase-money or compensation (including any sum stipulated for by the life-tenant in lieu of accommodation works or for assenting to the promoters' bill) is in general capital which has to be invested, and only the income produced is payable to the life-tenant: see 8 & 9 Vict. c. 18, ss. 69—71.

Exceptions:—

S. 72. (1) If the money does not exceed £20, the life-tenant is entitled to it (s. 72).

S. 73. (2) The Court may allot a portion of the money to the life-tenant as compensation for any injury, inconvenience, or annoyance, which he may be considered to sustain, independently of the actual value of the lands taken and of the damage occasioned to the lands held therewith (s. 73).

S. 74. (3) Where the purchase-money or compensation is paid in respect of any lease for life or years or any estate

Chap. III.

less than the fee, or of any reversion dependent on any such lease or estate, it may be applied in such manner as the Court considers will give to the parties interested in such money the same benefit therefrom as they might lawfully have had from the lease, estate, or reversion, or as near thereto as may be (s. 74).

Cases under L. C. Act.

The additional 10 per cent. paid for compulsory purchase, stands on the same footing as the rest of the purchase-money: *Re Wilkes*, 16 Ch. D. 597.

S. 69.

There is no apportionment under sect. 69, so that the life-tenant is not entitled to any part of the compensation money paid in respect of minerals, where there is no lease: *Re Robinson*, (1891) 3 Ch. 129; nor to the compensation paid for the enfranchisement of copyholds: *Re Wilson*, 2 J. & H. 619; or for withdrawing his opposition to the undertaking: *Pole* v. *Pole*, 2 Dr. & Sm. 420; see *Taylor* v. *Chichester, &c. R. Co.*, L. R. 4 H. L. 628;

S. 73.

unless he obtains an order under sect. 73, allowing him compensation in respect of any special injury sustained by him: see *Re Marlborough Estate Act*, 15 L. T. O. S. 341; *Re Collis*, 14 L. T. 352; *Taylor* v. *Chichester, &c. R. Co.*, L. R. 4 H. L. 628; and see *post*, p. 102. In all these cases the compensation money has to be invested and only the income paid to the life-tenant.

S. 74.

Sect. 74 only applies where less than the whole fee simple is acquired by the promoters: *Re Robinson*, (1891) 3 Ch. 129.

Leaseholds.

Until recently, there was no settled rule as to the allowance to be made to a life-tenant of leaseholds taken under the Act (see *Re Birch*, 10 L. T. 690): the Court in some cases only allowing the life-tenant the income produced by the purchase-money until his death or the expiration of the term of the lease, and then determining his interest in the capital: see *Re Beaufoy*, 1 Sm. & G. 20; *Jeffreys* v. *Conner*, 28 Beav. 328; *Re Money*, 2 Dr. & Sm. 94; in other cases directing a government annuity

of the same amount as the rent to be purchased for the life of the life-tenant, with liberty to apply as to the remainder of the fund at his death: see *Re Pfleger*, 6 Eq. 426; or ordering payment to him of an annual sum larger than the interest produced by the fund, and raising the excess out of capital (*Re Birch*, 10 L. T. 690; *Re North*, 19 L. T. 43); or ordering so much of the capital to be paid, with the dividends, from time to time, as would exhaust the fund by the end of the term: *Re Long*, 1 W. R. 226; *Littlewood* v. *Pattison*, 10 Jur. N. S. 875; *Re Treacher*, 18 L. T. 810.

Present rule.

But the rule is now settled that in the case of ordinary leaseholds taken under the Act, the life-tenant is entitled to receive, out of the income and capital of the purchase-money, an annuity of such an amount as will exhaust the fund by the end of the term: *Askew* v. *Woodhead*, 14 Ch. D. 27. If an annuity is not purchased, a reference to an actuary is directed, to calculate the amount to be raised every year out of income and capital, in accordance with the above rule: *Re Phillips*, 6 Eq. 250; *Askew* v. *Woodhead*, 14 Ch. D. 27; half-yearly sales of capital being ordered for that purpose: see *Seton*, 2447.

The rule is the same in the case of leaseholds settled by way of trust for sale with the consent of the life-tenant, if such consent was not given before the land was taken: *Askew* v. *Woodhead*, 14 Ch. D. 27.

Renewable leaseholds.

Leaseholds subject to a trust for perpetual renewal out of income, stand on a distinct footing: the life-tenant being only entitled to the interest on the purchase-money, although that may be less than the rent: *Re Wood*, 10 Eq. 572.

Ground rents.

Where settled land subject to a lease at a low ground rent is taken, the life tenant is entitled during the residue of the term to so much only of the income produced by the purchase-money as is equal to the rent: the rest of the income being accumulated till the end of the term,

Chap. III.

when (if still alive) he becomes entitled to the whole of the income arising from the purchase-money and from the accumulations during the remainder of his life: *Re Wootton*, 1 Eq. 589; *Re Wilkes*, 16 Ch. D. 597.

The same rule applies where the lease to which the property is subject was originally granted at a rack rent, but has become valuable owing to the rise in value of the land: *Re Mette*, 7 Eq. 72 (not following *Re Steward*, 1 Dr. 636).

If only part of the property subject to a lease is taken, and the tenant agrees to pay the same rent for the remainder, the whole of the income produced by the purchase-money must be accumulated till the expiration of the lease: *Re Griffith*, 49 L. T. 161.

Mineral lease.

Where settled minerals subject to a lease are taken, the right mode of determining the amount of compensation payable to the life-tenant is to ascertain the number of years within which the minerals could be worked out, and then divide the compensation money into as many equal parts, and give the life-tenant one of such parts every year: see *Re Robinson*, (1891) 3 Ch. at p. 133; *Re Fullerton*, (1906) 2 Ch. 138; *Cardigan* v. *Curzon-Howe*, 14 Times L. R. 550.

In one case, however, where the life-tenant was unimpeachable for waste, the whole of the lessor's share of the compensation was ordered to be paid to him: see *Re Barrington*, 33 Ch. D. 523.

Partition Act, 1868.

Where settled leaseholds are sold under the Partition Act, 1868 (31 & 32 Vict. c. 40), the life-tenant is only entitled to the dividends of the proceeds, without any allowance for loss of income; but he seems to have a right to re-investment in leaseholds: see *Langmead* v. *Cockerton*, 25 W. R. 315.

Settled Estates Act, 1877. Freeholds.

Where settled land is sold under the powers of the Settled Estates Act, 1877, the purchase-money is capital

which has to be invested, and only the income produced is payable to the life-tenant: see 40 & 41 Vict. c. 18, ss. 34, 36.

Lease or reversion.

But where the purchase-money is paid in respect of any lease for life or years, or any estate less than the fee, or of any reversion dependent on any such lease or estate, it may be applied in such manner as the Court considers will give to the parties interested in such money the same benefit therefrom as they might lawfully have had from the lease, estate, or reversion, or as near thereto as may be (s. 37). This enactment being in substantially the same words as sect. 74 of the Lands Clauses Consolidation Act, 1845, the cases on that section apply: *Re Walsh*, 7 L. R. Ir. 554; see *ante*, p. 44.

Renewable leaseholds.

Where, however, leaseholds subject to an overriding trust for renewal out of the rents, are sold after renewal has become impossible, the life-tenant is only entitled to the income produced by the purchase-money: *Re Barber*, 18 Ch. D. 624.

Settled Land Act, 1882. Freeholds.

Where settled land is sold under the powers of the Settled Land Act, 1882, the proceeds are capital money which (unless applied in discharge of incumbrances or in payment for improvements or in payment of costs, charges and expenses under the Act) must be invested: the life-tenant being entitled to the income of the investments: see 45 & 46 Vict. c. 38, ss. 21, 22.

The price paid for underwood, manures and fixtures, stands on the same footing: *Re Rosher*, (1899) W. N. 134.

The price received on the exercise of an option of purchase contained in a building lease granted under the Act, is also capital money: 52 & 53 Vict. c. 36, s. 3.

Lease or reversion.

But where the purchase-money is paid in respect of a lease for years or life, or in respect of any other estate or interest less than the fee, or in respect of a reversion

Chap. III.

dependent on any such lease, estate or interest, it may be applied by the trustees of the settlement or the Court in such manner as in their judgment will give to the parties interested in that money the like benefit therefrom as they might lawfully have had from the lease, estate, interest, or reversion, or as near thereto as may be: 45 & 46 Vict. c. 38, s. 34.

This enactment being in substantially the same words as the 74th section of the Lands Clauses Consolidation Act, 1845, the cases on that section apply: *Cottrell* v. *Cottrell*, 28 Ch. D. 628; see *ante*, p. 44.

Ground rents.

Accordingly, where settled land subject to a beneficial lease is sold under the Act, the life-tenant is only entitled during the residue of the term to so much of the income of the proceeds as is equal to the rent: the surplus being accumulated until the end of the term: *Cottrell* v. *Cottrell*, 28 Ch. D. 628; *Re Bowyer*, (1892) W. N. 48.

Heirlooms.

Proceeds of heirlooms sold under the Act are capital money, which (unless laid out in the purchase of other heirlooms) must be invested or applied in the same way as other capital money (s. 37): see *Re Marlborough*, 32 Ch. D. 1.

Copyhold Act, 1894.

Money paid for enfranchisement or for redemption or purchase of rent-charges under the Copyhold Act, 1894, is capital; but if it does not exceed £20 for all the enfranchisements or rent-charges in the manor, the Board of Agriculture have a discretion to direct it to be retained by the lord or person for the time being entitled to receive the rent-charge (although only a life-tenant) for his own use: 57 & 58 Vict. c. 46, ss. 26, 30, 31 (replacing similar provisions in the Copyhold Act, 1852).

Personal estate.

Where investments in personal estate are sold, the proceeds are capital of which the life-tenant is only

entitled to the income; and if any investment is sold for more than it cost, the life-tenant is not entitled to any part of the increase in value: see *Verner* v. *Gen. & Com. Invest. Trust*, (1894) 2 Ch. at p. 258.

Increase in value.

Thus, proceeds of sale of settled shares in a company, including any sum realized in excess of the amount paid up on the shares are capital, even though the shares have been purchased in breach of trust: *Re Bromley*, 55 L. T. 145; see *Stroud* v. *Gwyer*, 28 Beav. at p. 140; and see *Hubert* v. *Fetherstone*, 1 P. Wms. 648.

Shares.

And where the assets of a company were sold by the liquidator at a price which gave the shareholders more than the amount paid up on their shares, the life-tenant of settled shares was held not entitled to any part of the proceeds, although the company's reserve dividend fund had provided two-thirds of the surplus: *Re Armitage*, (1893) 3 Ch. 337.

The Apportionment Act, 1870, does not apply to a change of investment so as to render proceeds of sale apportionable in respect of accruing income not due at the date of sale, even where the life-tenant has died between the last payment of income and the sale: *Bulkeley* v. *Stephens*, (1896) 2 Ch. 241.

Apportionment on change of investment.

Accordingly, where stocks, shares or securities are sold between two dividend days, the life-tenant is not in general entitled to any apportionment of the proceeds in respect of the accruing dividend: *Scholefield* v. *Redfern*, 2 Dr. & Sm. 173; even if the sale takes place only a few days before the dividend becomes due: *Bostock* v. *Blakeney*, 2 Bro. C. C. 653.

The same rule applies to debentures and other property of that description, yielding interest accruing from day to day: *Scholefield* v. *Redfern*, 2 Dr. & Sm. 173.

The rule against apportionment of proceeds of sale is founded on the heavy burden, in the shape of costs, to

Reason of Rule.

Chap. III.

which a right of apportionment would subject settled property, by reason of the complex investigation which it might lead to on every change of investment: see *Scholefield* v. *Redfern*, 2 Dr. & Sm. at p. 183; accordingly, the rule is only departed from in cases of a special and exceptional nature: see *Freman* v. *Whitbread*, 1 Eq. at p. 276.

Thus, where the sale of stock was postponed until two months before dividend day, on account of the delay in completing a purchase of land, caused by difficulties of title, the Court refused to allow apportionment: *Freman* v. *Whitbread*, 1 Eq. 266.

Exceptional case.

But where trustees of settled consols contracted for the purchase of land to be completed just after dividend day, on the terms of taking the rents from that day, and about a month before the time sold out the consols (£500,000) *cum dividend*, on account of the Bank transfer books being closed at the time fixed for completion, the life-tenant was held entitled to the difference between the price obtained for the consols and their value *ex dividend*: *Londesborough* v. *Somerville*, 19 Beav. 295.

Sale by Court.

Apportionment is more readily allowed where the sale takes place by direction of the Court: as where stock is ordered to be sold shortly before the dividend becomes due, either for the benefit of the estate (*Bulkeley* v. *Stephens*, 3 N. R. 105), or for the purpose of distribution, instead of being transferred to the beneficiaries according to the trust: *Bulkeley* v. *Stephens*, (1896) 2 Ch. 241.

CHAPTER IV.

OUTGOINGS.

Outgoings.

In determining how outgoings are to be borne as between life-tenant and remainderman, it seems right to assume (unless the contrary appears) that the settlor intended the settled property to be preserved intact for those entitled in remainder; and on this ground it is submitted that ordinary outgoings of a recurring nature must in general be borne by income, in the absence of any provision in the settlement showing a contrary intention.

Rates and taxes.

King's taxes and local rates, assessed on the rental of the property, must therefore be discharged by the life-tenant, or, if the estate is managed by trustees, paid out of income: see *Re Redding*, (1897) 1 Ch. 876; *Kingham* v. *Kingham*, (1897) 1 I. R. 170; unless the property is unproductive and incapable of beneficial enjoyment by the life-tenant, in which case they come out of capital: see *Lonsdale* v. *Berchtoldt*, 3 K. & J. 185.

Licensing charge.

The annual charge in respect of an 'on licence' which the tenant of a settled public house deducts from his rent under the Licensing Act, 1904, has to be borne by the life-tenant: *Re Smith*, (1906) 1 Ch. 799.

Fee farm rents.

Fee farm rents and quit rents to which settled property is subject, appear to be equally within the above-stated principle, and to be payable out of income accordingly.

Chap. IV.

Rent of leaseholds.

Rent reserved by the lease under which settled leaseholds are held appears for the same reason to be payable out of income: see *Re Millichamp*, 52 L. T. at p. 760; *Re Hengler*, (1893) 1 Ch. at p. 587; *Re Redding*, (1897) 1 Ch. 876. But where the property is unproductive and incapable of beneficial enjoyment by the life-tenant, the rent is payable out of capital: see *Lonsdale* v. *Berchtoldt*, 3 K. & J. 185; and the rule seems to be the same where unproductive leaseholds form part of settled residue, although the life-tenant would not escape liability in respect thereof if enjoying other beneficial leaseholds in specie: see *Allen* v. *Embleton*, 4 Dr. 226; but in one case an apportionment was directed: see *Re Hengler*, (1893) 1 Ch. 586, *post*, p. 125.

A life-tenant of leaseholds under a will is bound, as between himself and the testator's estate, to pay the rent: see *Re Betty*, (1899) 1 Ch. 821; *Re Gjers*, (1899) 2 Ch. 54 (not following *Re Tomlinson*, (1898) 1 Ch. 232); *Kingham* v. *Kingham*, (1897) 1 I. R. 170.

Fire insurance.

Freeholds and copyholds.

A life-tenant of freeholds or copyholds does not appear to be liable to insure against fire, unless made liable by some provision in the settlement or by statute: see *Re Bennett*, (1896) 1 Ch. at p. 787; and if he insures, he would seem to have no claim against the estate for the premium: *Ib.*

Leaseholds.

It is conceived that a life-tenant of leaseholds stands on the same footing; but where the property is managed by trustees, it would seem that the cost of keeping the same insured, in accordance with the covenants in the lease, has to be borne by income: see *Re Redding*, (1897) 1 Ch. 876; unless the property is unproductive and incapable of beneficial enjoyment by the life-tenant, in which case the cost comes out of capital: see *Lonsdale* v. *Berchtoldt*, 3 K. & J. 185.

A life-tenant of leaseholds under a will is bound as between himself and the testator's estate, to insure,

in accordance with the covenants in the lease: see *Re Betty*, (1899) 1 Ch. 821; *Re Gjers*, (1899) 2 Ch. 54; but see *Kingham* v. *Kingham*, (1897) 1 I. R. 170.

Furniture.

A life-tenant of furniture seems not to be liable to insure, unless made liable by some provision in the settlement: see *Re Betty*, (1899) 1 Ch. at p. 829.

Trustee Act, 1893, s. 18.

By the Trustee Act, 1893, power is given to trustees to insure any building or other insurable property against loss or damage by fire up to three-fourths of the full value, and to pay the premiums out of income, without the consent of the life-tenant; 56 & 57 Vict. c. 53, s. 18 (re-enacting 51 & 52 Vict. c. 59, s. 7). And heirlooms have been held to be insurable property within the section: *Re Egmont*, (1908) 1 Ch. 821; see *ante*, p. 7.

Conveyancing Act, 1881, s. 42.

A similar power to insure is given in certain cases by the Conveyancing Act, 1881, where the life-tenant is an infant: see 44 & 45 Vict. c. 41, s. 42; see *Re Quicke*, (1908) 1 Ch. 887.

In cases not within the above Acts, trustees seem unable to pay premiums out of income, unless authorized by the settlement: see *Re Bennett*, (1896) 1 Ch. at p. 786.

Statutory liability. Improvement of Land Act.

A life-tenant is bound to insure and keep insured against fire, all farmhouses, farm buildings, and works susceptible of damage by fire, which have been erected, improved, or added to, under the Improvement of Land Act, 1864, in an amount equal to the principal amount originally secured by the charge under the Act, so long as any instalments are payable by him in respect thereof: 27 & 28 Vict. c. 114, s. 74.

Limited Owners Residences Act.

He is bound to insure against fire to the same extent, any mansion-house erected, improved, or added to, under the Limited Owners Residences Act, 1870: 33 & 34 Vict. c. 56, s. 8.

S. I. Act, 1882.

He is also bound to insure and keep insured at his

Chap. IV.

own expense, any building or work in its nature insurable against damage by fire, which is comprised in any improvement executed under the Settled Land Act, 1882, in such amount (if any) as may be prescribed by the certificate of the Land Commissioners or their successors, the Board of Agriculture, now the Board of Agriculture and Fisheries: 45 & 46 Vict. c. 38, s. 28; 52 & 53 Vict. c. 30, s. 2; 3 Ed. VII. c. 31, s. 1.

S. L. Act, 1887.

A similar liability exists to insure any improvement of a kind authorized by the Settled Land Act, 1882, in payment for which capital money is applied or deemed to be applied (see *post*, p. 117) under the powers of the Settled Land Act, 1887: 50 & 51 Vict. c. 30, s. 2.

Repairs.

Freeholds: Legal life-tenant.

A legal life-tenant of freeholds is not liable to repair, whether he be without impeachment of waste (*Lansdowne* v. *Lansdowne*, 1 J. & W. 522), or impeachable for waste (*Re Cartwright*, 41 Ch. D. 532); unless made liable by some provision in the settlement or by statute: see *post*, pp. 58, 61. The decision to the contrary in *Parteriche* v. *Powlet*, 2 Atk. 383, would seem to be incorrectly reported: see *Powys* v. *Blagrave*, 4 D. M. & G. at p. 454.

Dicta are to be found in several cases to the effect that a life-tenant is bound to repair: see *Ex p. Barrett*, 19 L. J. Ch. at p. 415; *Macnolty* v. *Fitzherbert*, 27 L. J. Ch. 272; *Dunne* v. *Dunne*, 3 Sm. & G. at p. 28; *Re Leigh*, 6 Ch. at p. 892. But these dicta seem to have been evoked in each case by the application of a life-tenant to have repairs done at the expense of capital; and it is apprehended that their meaning is merely that if a life-tenant wants repairs done he must do them himself.

Jud. Act, 1873, s. 25.

The cases at law as to permissive waste are rendered obsolete by sect. 25 of the Judicature Act, 1873, as, under that section, if there is any conflict or variance

between the rules of equity and the rules of the common law, the rules of equity prevail: see *Barnes* v. *Dowling*, 44 L. T. at p. 810.

A legal life-tenant of freeholds is not entitled to have repairs done at the expense of the estate: *Brunskill* v. *Caird*, 16 Eq. 493; see *Dunne* v. *Dunne*, 3 Sm. & G. at p. 28; nor is he entitled to a charge on the estate for repairs done by himself: *Hamer* v. *Tilsley*, Joh. 486. It makes no difference that the repairs are rendered necessary by dry rot, or by dilapidations existing at the date of the settlement: *Hibbert* v. *Cooke*, 1 Sim. & St. 552; *Re De Teissier*, (1893) 1 Ch. 153; *Re De Tabley*, 75 L. T. 328.

In one case, permanent repairs done by order of the Court, to enable the property to be let, were allowed out of capital: *Macnolty* v. *Fitzherbert*, 27 L. J. Ch. 272; see, however, *Hill* v. *Maurice*, 16 L. J. Ch. 280.

Equitable life tenant.

Where the equitable interest is settled but the trustees have a bare legal estate without any power of management, the case stands on the same footing as where the legal estate is settled: *Re Willis*, (1902) 1 Ch. 15.

Accordingly, an equitable life-tenant of freeholds is not liable to repair, whether the property be originally included in the settlement: *Powys* v. *Blagrave*, Kay, 495; 4 D. M. & G. 448; *Warren* v. *Rudall*, 1 J. & H. 1; *Re Hotchkys*, 32 Ch. D. 408; or purchased under a power: *Re Freman*, (1898) 1 Ch. 28; unless he is made liable by some provision in the settlement or by statute: see *post*, pp. 58, 61. But if he does repair, or allows the trustees to apply income in repairs, he cannot charge the expense on the estate: *Sharshaw* v. *Gibbs*, Kay, 333; any charge for that purpose must be a matter of bargain: see *Warren* v. *Rudall*, 1 J. & H. at p. 14.

Trustees' management.

Where the estate is managed by trustees, it is

Chap. IV.

conceived that ordinary current repairs must be discharged out of income; but if the trustees have no power of management, and substantial repairs are necessary for the preservation of the property, the Court will on the application of the trustees, allow the cost to be raised out of capital, which, by reducing the income, divides the burden in fair proportions between the life-tenant and remainderman: see *Re Hotchkys*, 32 Ch. D. at pp. 415, 418, 420; and necessary repairs to property purchased under a power in a personalty settlement and held upon trust for sale, have been directed to be raised in this way: *Re Freman*, (1898) 1 Ch. 28.

Each case must depend on its own circumstances, and the Court has power to apportion the cost, so as to throw part of the capital expenditure on the life-tenant: see *Re Farnham*, (1904) 2 Ch. 561.

Dangerous structure notice.

A life-tenant not being liable to repair, there seems to be no ground for charging him with the consequences of allowing the property to fall into disrepair; and it is thought that repairs required to be done to comply with a dangerous structure notice, given by a Local Authority, ought, in general, to be borne by capital, the expense being charged on the estate and the life-tenant paying interest on the amount: see *Warren* v. *Rudall*, 1 J. & H. at p. 14; *Re De Teissier*, (1893) 1 Ch. at pp. 161, 162; but see *post*, p. 57.

Copyholds.

A life-tenant of copyholds is not liable to repair: *Wood* v. *Gaynon*, Amb. 395; *Barnes* v. *Dowling*, 44 L. T. 809; unless made liable by some provision in the settlement or by statute: see *post*, pp. 58, 61; but he may be liable to the lord of the manor by special custom: see *Blackmore* v. *White*, (1899) 1 Q. B. 293; and it is conceived that he has no greater right than a life-tenant of freeholds, to have repairs done at the expense of the estate.

Leaseholds: legal life-tenant.

A legal life-tenant of leaseholds is not liable to repair, as between himself and the remainderman, even though the lease contain a covenant to keep in repair: *Re Parry & Hopkin*, (1900) 1 Ch. 160; see *Re Tomlinson*, (1898) 1 Ch. 232; unless made liable by some provision in the settlement or by statute: see *post*, pp. 58, 61. But it is conceived that, as in the case of freeholds (see *ante*, p. 55), he is not entitled to have repairs done at the expense of the estate.

Equitable life-tenant.

An equitable life-tenant of leaseholds seems to stand on the same footing; see *Re Courtier*, 34 Ch. D. 136 (where the dilapidations existed at the death of the testator). He may of course render himself liable by special contract: see *Marsh* v. *Wells*, 2 Sim. & St. 87.

Leaseholds.

The trustees' right to have the rents applied in keeping the property free from forfeiture (see *Re Fowler*, 16 Ch. D. 723) does not affect the rights of the life-tenant and remainderman as between themselves: *Re Courtier*, 34 Ch. D. 136.

Where the property is managed by trustees, it would seem that ordinary current repairs must be discharged out of income: see *Re Redding*, (1897) 1 Ch. 876; *Waldron* v. *Bogue*, (1904) 1 I. R. 240; unless the property is unproductive and incapable of beneficial enjoyment by the life-tenant, in which case they come out of capital: see *Lonsdale* v. *Berchtoldt*, 3 K. & J. 185; and the rule seems to be the same as to leaseholds forming part of residue: see *Allen* v. *Embleton*, 4 Dr. 226.

Dangerous structure notice.

In one case, where leaseholds were sublet at a low rent, repairs required to be done by a sanitary notice under the Public Health (London) Act, 1891, and by a dangerous structure notice under the London Building Act, 1894, were held chargeable against income: see *Re Copland*, (1900) 1 Ch. 326. The decision, however, appears to have been founded on the life-tenant's admission that she would have been liable if in receipt of the rack rent; the only point argued being whether

Chap. IV.

the fact of the property being sublet at a low rent made any difference; and it is submitted that in ordinary cases, repairs required to be done by a dangerous structure notice given by a Local Authority, ought to be borne by capital, as in the case of freeholds (see *ante*, p. 56).

Liability of settlor's estate.

The life-tenant of leaseholds under a will is liable as between himself and the testator's estate, to perform the lessee's covenants as to current repairs: see *Re Betty*, (1899) 1 Ch. 821; *Re Gjers*, (1899) 2 Ch. 54: *Kingham* v. *Kingham*, (1897) 1 I. R. 170 (not following *Re Baring*, (1893) 1 Ch. 61, and *Re Tomlinson*, (1898) 1 Ch. 232); and see *Re Parry & Hopkin*, (1900) 1 Ch. at p. 161; but he is not liable to the testator's estate in respect of dilapidations existing at the date of the testator's death: see *Harris* v. *Poyner*, 1 Dr. 174; *Alden* v. *Kennerley*, 7 L. T. 312; *Pinfold* v. *Shillingford*, 46 L. J. Ch. 491; *Re Courtier*, 34 Ch. D. 136; *Brereton* v. *Day*, (1895) 1 I. R. 518.

Special provisions.

A condition in a will that the life-tenant shall keep the settled property in repair renders him liable to repair: *Caldwall* v. *Baylis*, 2 Mer. 408; *Woodhouse* v. *Walker*, 5 Q. B. D. 404; *Re Williames*, 54 L. T. 105; even though the dilapidations existed at the date of the testator's death: *Re Bradbrook*, 56 L. T. 106; *Dingle* v. *Coppen*, (1899) 1 Ch. 726; and to rebuild in case of fire; *Re Skingley*, 3 Mac. & G. 221; *Gregg* v. *Coates*, 23 Beav. 33; and (*semble*) to comply with dangerous structure notices: *Re Willis*, (1902) 1 Ch. 15.

But a condition that the life-tenant shall pay all outgoings and repair, has been held only to apply to current repairs, and not to render him liable to make good dilapidations existing at the date of the testator's death: *Re Smith*, 84 L. T. 835.

A condition of this kind is not in the nature of a trust,

but binds the person in whom the life estate is for the time being vested: *Kingham* v. *Lee*, 15 Sim. 396; and seems to be enforceable by the remainderman either at law (*Hodges* v. *Tattersfield*, 2 Times L. R. 832), or in equity without the intervention of the trustees: see *Tudball* v. *Medlicott*, 36 W. R. 886; although before the Judicature Act, 1873, the Court of Chancery would not interfere where the estates were legal: see *Kinnersley* v. *Williamson*, 39 L. J. Ch. 788.

The cost of repairs may be thrown upon income by a direction to repair out of the rents: *Crowe* v. *Crisford*, 17 Beav. 507; see *Cooke* v. *Cholmondeley*, 4 Dr. 326; or by a trust for management with power to repair and pay expenses of management out of the rents: *Clarke* v. *Thornton*, 35 Ch. D. 307; or, in the case of leaseholds, by a direction for payment out of the rents of all the costs, charges and expenses of carrying into execution the trusts of the will: see *Re Baring*, (1893) 1 Ch. 61; *Debney* v. *Eckett*, 43 W. R. 54; or by a direction for payment of all incidental expenses and outgoings out of the rents: see *Re Thomas*, (1900) 1 Ch. at p. 323.

But a trust to keep houses in repair out of the rents applies only to ordinary repairs, and not to repairs which would be equivalent to rebuilding: *Crowe* v. *Crisford*, 17 Beav. 507; see *Pinfold* v. *Shillingford*, 46 L. J. Ch. 491.

On the other hand, a proviso that repairs shall be done at the direction of the life-tenant, and that expenses incurred in carrying out the trust shall constitute a charge on the premises, entitles him to have the cost of repairs raised out of capital: *Skinner* v. *Todd*, 46 L. T. 131.

A power for the trustees to make any outlay for the benefit of the estate out of income or capital, does not authorize them to charge repairs against capital: *Re De Tabley*, 75 L. T. 328.

Chap. IV.

Trust to invest in land.

A trust or power to invest money in land does not authorize expenditure in repairs, however necessary, if the limitations of the settlement are legal limitations: *Brunskill* v. *Caird*, 16 Eq. 493; *Drake* v. *Trefusis*, 10 Ch. 364; see *Dunne* v. *Dunne*, 3 Sm. & G. 22; although in several cases, where trustees had invested money in the purchase of old and dilapidated farm buildings, the Court has allowed further trust money to be applied in putting them into repair: see *Re Barrington*, 1 J. & H. 142; *Cowley* v. *Wellesley*, 46 L. J. Ch. 869; but see *Bostock* v. *Blakeney*, 2 Bro. C. C. 653.

Salvage.

But if the limitations of the settlement are equitable, the Court seems to have jurisdiction, on the principle of salvage, to authorize the expenditure of capital money in doing repairs which are absolutely necessary for the preservation of the property, if there are no other means of doing them: see *Re De Tabley*, 75 L. T. 328; *Re De Teissier*, (1893) 1 Ch. at p. 161; and see *Conway* v. *Fenton*, 40 Ch. D. 512; *Re Willis*, (1902) 1 Ch. 15.

Lands Clauses Act.

Money paid into Court under the Lands Clauses Consolidation Act, 1845, in respect of settled land, is not applicable in executing repairs: see 8 & 9 Vict. c. 18, s. 69; *Re Leigh*, 6 Ch. 887; *Ex p. Barrett*, 19 L. J. Ch. 415; although in one case a small sum was allowed to be applied in executing repairs necessary for the preservation of the estate: see *Re Aldred*, 21 Ch. D. 228; and the power given by the Settled Land Act, 1882, to apply money so paid in as capital money arising under that Act (45 & 46 Vict. c. 38, s. 32) seems not to extend the jurisdiction in this respect: see *infra*.

Settled Estates Act.

Money received on a sale under the Settled Estates Act, 1877, cannot (it seems) be applied in executing repairs, inasmuch as the 34th section of the Act (40 & 41 Vict. c. 18) is no wider than sect. 69 of the Lands Clauses Consolidation Act; and the jurisdiction seems

not to be extended by the power given by the Settled Land Act, 1882, to apply such money as capital money under that Act (45 & 46 Vict. c. 38, s. 32) ; see *infra*.

Such an application, however, seems to have been allowed under the corresponding section of the Settled Estates Act, 1856, when the repairs were shown to be for the permanent benefit of the estate : *Re Clitheroe*, 17 W. R. 345 ; *Re Newman*, 9 Ch. 681.

Settled Land Act, 1882.

The Settled Land Acts do not authorize the expenditure of capital money in doing ordinary repairs : *Clarke* v. *Thornton*, 35 Ch. D. 307 ; *Re De Teissier*, (1893) 1 Ch. 153 ; *Re Tucker*, (1895) 2 Ch. 468 ; *Re Willis*, (1902) 1 Ch. 15 ; *Re Thomas*, (1900) 1 Ch. at p. 323 ; and see *Re Daniell*, (1894) 3 Ch. 503, as to what repairs form a proper consideration for a building lease.

Statutory liability.

A statutory liability to repair exists in the following cases :—

Land Drainage Act, 1845.

(1) A life-tenant is bound to keep in repair any buildings erected or built, or embankments or works for irrigation constructed or made, under the Land Drainage Act, 1845, and as if he were a tenant for life subject to impeachment for waste : 8 & 9 Vict. c. 56, s. 11.

Public Money Drainage Act, 1846.

(2) A life-tenant is bound to uphold the drains on account of which a rent-charge has been created under the Public Money Drainage Act, 1846, and to keep clear and open the outfalls thereof, so long as any instalments of the charge are payable by him : 9 & 10 Vict. c. 101, s. 39.

Improvement of Land Act, 1864.

(3) A life-tenant is bound to uphold all improvements and works in respect of which a charge is made under the Improvement of Land Act, 1864, and to keep clear and open the outfalls and watercourses of all the drains (if any) so long as any instalments of the charge are payable by him, unless relieved from this liability by

Chap. IV.

the certificate of the Inclosure Commissioners, or their successors, the Land Commissioners (45 & 46 Vict. c. 38, s. 48), or Board of Agriculture, now the Board of Agriculture and Fisheries (52 & 53 Vict. c. 30, s. 2; 3 Ed. VII. c. 31), that the maintenance of the works is not expedient or necessary: 27 & 28 Vict. c. 114, ss. 72, 76.

Settled Estates Act, 1877.

(4) A life-tenant seems bound (if the Court so directs) to allow the repair or maintenance of any streets, roads, paths, squares, gardens, open spaces, sewers, drains, watercourses, or other works executed under the Settled Estates Act, 1877, to be effected out of income during such period as to the Court shall seem advisable: see 40 & 41 Vict. c. 18, s. 21.

Settled Land Act, 1882.

(5) A life-tenant is bound to maintain and repair at his own expense every improvement executed under the powers of the Settled Land Act, 1882, during the period prescribed by the certificate of the Land Commissioners, or their successors, the Board of Agriculture, now the Board of Agriculture and Fisheries: 45 & 46 Vict. c. 38, s. 28; 52 & 53 Vict. c. 30, s. 2; 3 Ed. VII. c. 31.

Settled Land Act, 1887.

(6) A similar liability exists to maintain and repair any improvement of a kind authorized by the Act of 1882, in payment for which capital money is applied or deemed to be applied (see *post*, p. 117) under the powers of the Settled Land Act, 1887: 50 & 51 Vict. c. 30, s. 2.

Cleansing lake.

A life-tenant has been held not bound to cleanse a lake on the settled land, although directed by the settlement to keep the property in good repair and condition: *Dashwood* v. *Magniac*, (1891) 3 Ch. 306.

Keeping up mines.

If a life-tenant expends money in keeping up mines to prevent forfeiture, and the inheritance is benefited thereby, he seems to be entitled to be recouped out of capital: *Dent* v. *Dent*, 30 Beav. 363.

Compulsory drainage works.

Drainage work required by a Local Authority to be done under the Metropolis Local Management Acts,

or the Public Health Acts, stands on a distinct footing from repairs, as it usually involves reconstruction at considerable cost: and not being an ordinary outgoing of a recurring nature, it seems to be more properly chargeable against capital than against income.

The provisions in the above-mentioned Acts, throwing the cost on the persons for the time being in receipt of the rack-rent, seem only intended to determine the liability as between landlord and tenant, and not as between life-tenant and remainderman: and although in one case Pearson, J., seems to have regarded those provisions as *primâ facie* throwing the cost on the life-tenant (see *Re Crawley*, 28 Ch. D. at pp. 433, 434), in several later cases where the trustees, being in receipt of the rack rents, were liable under the Acts, the Court has treated the expense as being properly paid out of capital: see *Re Barney*, (1894) 3 Ch. 562; *Re Lever*, (1897) 1 Ch. 32; and it is submitted that the incidence of the charge, as between life-tenant and remainderman, is governed by the nature of the work and not by the provisions of the Acts.

Thus, in the case of settled freeholds vested in trustees, the expense of new drainage work done by them between 1861 and 1869, which might have been enforced under the Public Health Act, 1848, was held to be properly payable out of capital, notwithstanding a clause in the settlement imposing the liability to repair on the persons entitled to the rents: *Re Barney*, (1894) 3 Ch. 562.

Leaseholds.

In the case of freeholds and leaseholds settled by way of trust for sale, with a direction to pay the intermediate rents and profits to the life-tenant, the cost of compulsory drainage work under the Public Health (London) Act, 1891, so far as in the nature of a permanent improvement, has been held to be payable out of capital: *Re Lever*, (1897) 1 Ch. 32; *Re Farnham*, (1904) 2 Ch. 561; but see *Re Copland*, (1900) 1 Ch. 326.

Where, however, the charge is thrown on the

Chap. IV.

life-tenant by the settlement, he must bear it, unless payment is allowed out of capital under the Settled Land Acts.

Thus, where leaseholds were settled upon trust to pay the rents and profits to one for life, after payment of all ordinary outgoings, the life-tenant was held liable for the cost of compulsory drainage work under the Metropolis Local Management Act, which was thrown on the lessee by the covenants in the lease: *Re Crawley*, 28 Ch. D. 431; and a similar decision was come to where there was an overriding trust for performance of the covenants (which included drainage work) out of income: *Re Partington*, (1902) 1 Ch. 711.

But in a recent case, where leasehold houses were settled by way of trust for sale, the cost of reconstructing the drainage (which had been practically condemned by the Local Authority) was allowed out of capital as an improvement under the Settled Land Acts, although the life-tenant was only given the rents after payment of all incidental expenses and outgoings, the defect not being due to her neglect: *Re Thomas*, (1900) 1 Ch. 319.

Paving and sewering expenses.

The expense of paving and sewering streets under the Metropolis Local Management Acts, and the Public Health Acts, seems to stand on the same footing as compulsory drainage expenses: see *supra*.

In a case under the Metropolis Local Management Act, where the life-tenant died before the work was done, the remainderman was of course held liable: *Re Field*, W. N. 1888, 36.

Under the Public Health Act, 1875, the expenses are a charge on the inheritance, and if the life-tenant is compelled to pay he is entitled to be recouped out of capital: *Re Smith*, (1901) 1 Ch. 689; but where the sum is payable by instalments made up of principal and interest, he is only entitled to be recouped the part representing principal: *Re Legh*, (1902) 2 Ch. 274.

In one case, an equitable life-tenant of leaseholds subject to payment of all outgoings, was held not liable for expenses of paving done in his lifetime by a Local Authority under the Public Health Act, 1875, as the assessment was not made, and the instalments did not become payable until after his death: *Re Boor*, 40 Ch. D. 572.

Private street expenses.

Private street expenses are also a charge on the inheritance, and if the life-tenant pays the charge, he is entitled to be recouped out of capital: *Re Pizzi*, (1907) 1 Ch. 67.

Liability of settlor's estate.

As to the liability of the settlor's estate in the case of a settlement by will, for outgoings in arrear at the date of his death, see *Re Clereland*, (1894) 1 Ch. 164.

Apportionment.

The Apportionment Acts only deal with periodical payments in the nature of income, but the remedies given for recovering apportioned parts of such payments are subject to allowing proportionate parts of all just allowances: 4 & 5 Will. IV. c. 22, s. 2; 33 & 34 Vict. c. 35, s. 4; see *ante*, p. 20; and it is conceived that rent, rates, taxes, and other annual outgoings, are apportionable under these sections: and see *Rochester* v. *Le Fanu*, (1906) 2 Ch. 513.

But the Acts do not render apportionable any annual sums made payable in policies of assurance of any description: 4 & 5 Will. IV. c. 22, s. 3; 33 & 34 Vict. c. 35, s. 6.

As to apportionment of interest on incumbrances, see *post*, p. 107.

As to the old law, see *Sutton* v. *Chaplin*, 10 Ves. 66.

CHAPTER V.

IMPROVEMENTS.

Chap. V.

Improvements.

A LIFE-TENANT is not entitled to have improvements made at the expense of the estate, except under the express authority of the settlement or a statute: *Nairn* v. *Marjoribanks*, 3 Russ. 582; *Dunne* v. *Dunne*, 3 Sm. & G. 22; 7 D. M. & G. 207; and if he voluntarily spends money in building, draining, or otherwise improving the property, without such authority, he is not entitled to be repaid out of capital; *Caldecott* v. *Brown*, 2 Ha. 144; *Horlock* v. *Smith*, 17 Beav. 572; *Dixon* v. *Peacock*, 3 Dr. 288; *Dent* v. *Dent*, 30 Beav. 363; see *Rowley* v. *Ginnever*, (1897) 2 Ch. at p. 506; *Gilliland* v. *Crawford*, I. R. 4 Eq. 35.

Voluntary outlay.

The same rule applies to unauthorized improvements made by the trustees at the instance of the life-tenant: *Harris* v. *Harris*, 10 W. R. 826.[1]

And where a life-tenant, who was also the trustee, expended a large sum in erecting a mansion-house and making other improvements on settled land, he was held not entitled to a charge for his expenditure: *Mathias* v. *Mathias*, 3 Sm. & G. 552.

But where a life-tenant purchases land of which he is afterwards declared a constructive trustee for the persons interested under the settlement, he is in general entitled to be recouped his expenditure on improvements, to the extent of the improved value, out of capital: see *Rowley* v. *Ginnever*, (1897) 2 Ch. 503.

Compulsory outlay.

As to drainage work and paving done under com-

pulsion of an order of the Local Authority, see *ante*, pp. 62–64.

As to the liability of the settlor's estate for the cost of performing the lessee's covenants to erect buildings on leasehold land settled by his will, see *Marshall* v. *Holloway*, 5 Sim. 196.

Jurisdiction of Court.

Where a personalty fund is settled on trusts corresponding to the uses of a settled estate, the Court can authorize the employment of part of the fund in rebuilding the mansion-house: *Re Pearson*, 21 W. R. 401; *Donaldson* v. *Donaldson*, 3 Ch. D. 743; and see *post*, p. 69.

But except in cases of salvage, or where a power contained in the settlement or conferred by statute applies, there is no jurisdiction to charge the estate with the cost of improvements; and the Court has accordingly refused to sanction the raising of money for pulling down and rebuilding houses on the estate for the mere purpose of increasing its rental or capital value: *Re Montagu*, (1897) 2 Ch. 8.

And where improvements in draining and building were made under order of the Court, out of income during the minority of the life-tenant, it was held that no part of the expense could be charged against capital: *Floyer* v. *Bankes*, 8 Eq. 115.

Salvage.

If, however, buildings are actually falling down, a case of salvage arises, which stands on a different footing: see *Re Montagu*, (1897) 2 Ch. at p. 11.

Thus, where it was necessary to pull down the mansion-house on account of the foundations having given way, and to rebuild on a fresh site, the Court authorized the cost to be raised by mortgage of the estate: *Frith* v. *Cameron*, 12 Eq. 169.

And where the life-tenant under a will had expended money in completing a mansion-house left unfinished by the testator, which would have gone to ruin if not

Chap. V.

completed, the Court directed an inquiry whether it was for the benefit of all parties interested, with the view of giving the life-tenant a charge on the estate: *Hibbert* v. *Cooke*, 1 Sim. & St. 552; *Dent* v. *Dent*, 30 Beav. 363; see *Re Montagu*, (1897) 2 Ch. at p. 10.

But applications based on the doctrine of salvage are dealt with strictly; and the Court has refused to extend the principle to a case where the rebuilding of a mansion-house was necessitated by dry rot: it being impossible to distinguish between what had been spent on salvage and what had been spent on improvements: *Re Legh*, (1902) 2 Ch. 274.

So, where a life-tenant spent large sums in completing unfinished houses begun by the settlor as a speculation, instead of letting them as they stood, he was held not entitled to any charge on the estate for his expenditure: *Gilliland* v. *Crawford*, I. R. 4 Eq. 35; but in another case where similar expenditure was shown to have been necessary to prevent the houses becoming a total loss, the Court gave the life-tenant a charge for part of the sum spent: see *Ferguson* v. *Ferguson*, 17 L. R. Ir. 552, 567.

Special provisions.

A condition that the life-tenant shall keep the property in repair, does not render him liable to complete a building unfinished at the date of the settlement: *Joliffe* v. *Twyford*, 26 Beav. 227; or to pay for new drainage work: *Re Barney*, (1894) 3 Ch. 562.

A trust to keep in repair out of the rents and profits, does not make the income liable for expenses of rebuilding: *Crowe* v. *Crisford*, 17 Beav. 507; *Cooke* v. *Cholmondeley*, 4 Dr. 326.

So, a trust to pay the rents to one for life, after deducting taxes, repairs, improvements, salaries, renewal fines, and all other necessary outgoings, was held not to throw on the life-tenant the expense of new buildings; *Walpole* v. *Boughton*, 12 Beav. 622.

Power of management.

A discretionary power for trustees to make improvements out of either capital or income, is a power of management only, which does not enable them to decide how the expense is to be borne as between the life-tenant and remainderman; and improvements of a permanent nature effected under such a power are properly payable out of capital: *Re Bute*, 27 Ch. D. 196.

Accordingly, where income had been applied under such a power in constructing and enlarging wharves, docks and piers, the life-tenant was held entitled to a charge on the inheritance for the amount so applied: *Re Bute*, 27 Ch. D. 196.

So, the expense of fencing under such a power has been held to be payable out of capital: *Cowley* v. *Wellesley*, 1 Eq. 656.

As to conflict between the provisions of a settlement and the provisions of the Settled Land Acts, see *post*, p. 83.

Trust to invest in land.

A trust to invest money in land authorizes expenditure in erecting new buildings, either on land purchased under the trust (*Re Barrington*, 1 J. & H. 142), or on land already settled: *Drake* v. *Trefusis*, 10 Ch. 364; *Re Leslie*, 2 Ch. D. 185 (in effect overruling *Poulett* v. *Somerset*, 19 W. R. 1048); or in rebuilding houses which are in a ruinous state (if beneficial to the estate), either on the land already settled (*Re Hotham*, 12 Eq. 76; *Drake* v. *Trefusis*, 10 Ch. 364), or on the land purchased: *Cowley* v. *Wellesley*, 46 L. J. Ch. 869; or (*semble*) in preventing buildings from going to destruction: see *Caldecott* v. *Brown*, 2 Ha. at p. 146; or in executing drainage works: *Re Leslie*, 2 Ch. D. 185; but not in improving a mansion-house: *Dunne* v. *Dunne*, 3 Sm. & G. 22; 7 D. M. & G. 207; nor in reinstating a mansion-house destroyed by fire: *Drake* v. *Trefusis*, 10 Ch. 364; see *Jesse* v. *Lloyd*, 48 L. T. 656; nor in executing other improvements: *Bostock* v. *Blakeney*, 2 Bro. C. C. 653;

Chap. V.

Brunskill v. *Caird*, 16 Eq. 493; except so far as authorized by the settlement or by statute. The cases under the Lands Clauses Consolidation Act and Settled Estates Acts (*see infra*) are also authorities in point: *Drake* v. *Trefusis*, 10 Ch. at p. 366.

And where, under a settlement, money is in the hands of trustees, and is liable to be laid out in the purchase of land to be made subject to the settlement, they may, at the option of the life-tenant, apply it as capital money arising under the Settled Land Act, 1882: 45 & 46 Vict. c. 38, s. 33; *Re Mundy*, (1891) 1 Ch. 399; *Re Thomas*, (1900) 1 Ch. at p. 323; and see *post*, p. 76.

Lands Clauses Act, 1845.

Money paid into Court under the Lands Clauses Consolidation Act, 1845, in respect of settled land, being liable to be laid out in the purchase of land (8 & 9 Vict. c. 18, s. 69), could always be applied in

Building and rebuilding.

erecting new buildings or rebuilding such as had become so ruinous as to require taking down, if an increased income would be produced thereby: see *Re Wight*, 6 W. R. 718; *Ex p. Melward*, 27 Beav. 571; *Re Dummer*, 2 D. J. & S. 515; *Drake* v. *Trefusis*, 10 Ch. 364; provided the remainderman did not object: *Re Leigh*, 6 Ch. 887; and in one case, where trade buildings had been rendered useless by the promoters' undertaking, the Court allowed part of the fund to be applied in taking them down and erecting dwelling-houses instead: *Re Johnson*, 8 Eq. 348.

Additions.

Money in Court under the Act has also been allowed to be applied in making remunerative additions to a house: *Re Speer*, 3 Ch. D. 262; or furnishing a water supply: see *Re Croker*, W. N. 1877, 38; but not in

Alterations.

making unremunerative alterations: *Re Leigh*, 6 Ch. 887; although in one case where farm buildings had been rendered uninsurable by the risk of fire from sparks of passing engines, the Court authorized the application of part of the fund in replacing a thatch roof with slates or tiles: *Re Johnson*, 8 Eq. 348; and

small sums were occasionally paid out to a life-tenant on his undertaking to apply them in lasting improvements: see *Ex p. Barrett*, 19 L. J. Ch. 415.

Past expenditure which is a charge within the meaning of sect. 69 may be allowed out of the money in Court.

Dangerous structures.

Thus, where the life-tenant had rebuilt houses which had been condemned under the dangerous structure clauses of the Metropolitan Building Act, 1855, the money in Court was ordered to be applied in recouping him: *Ex p. Davis*, 3 De G. & J. 144.

But the Court has refused to sanction the application of money under the Act, in recouping past voluntary expenditure on improvements: *Re Leigh*, 6 Ch. 887; *Re Stock*, 42 L. T. 46; except with the consent of all parties interested: *Re Partington*, 11 W. R. 160.

S. L. Act, 1882, s. 32.

And now, money in Court under the Act, and liable to be laid out in the purchase of land to be made subject to a settlement, may be applied as capital money arising under the Settled Land Act, 1882: 45 & 46 Vict. c. 38, s. 32; see *post*, p. 76.

Settled Estates Act, 1877.

Money paid into Court under the Settled Estates Act, 1877, in respect of settled land, being liable to be laid out in the purchase of land (40 & 41 Vict. c. 18, s. 34, re-enacting 19 & 20 Vict. c. 120, s. 23), could always be applied in erecting new buildings: see *Re Newman*, 9 Ch. 681; the Court being further empowered to direct payment thereout of the expense of making streets, roads, paths, squares, gardens, or other open spaces, sewers, drains or watercourses, including all necessary or proper fences, pavings, connexions and other works incidental thereto (40 & 41 Vict. c. 18, s. 21, re-enacting 39 & 40 Vict. c. 30, s. 1).

Sewering and paving expenses charged on property in a town by a Local Authority have accordingly been allowed out of the proceeds of land sold under the

Chap. V.

Act: *Re Hilliard*, 38 L. T. 93; but not the expense of draining for agricultural purposes: *Re Poynder*, 50 L. J. Ch. 753; although the fund was in one case allowed to be applied in making an embankment to prevent the estate from being flooded (*Re Leadbitter*, 30 W. R. 378).

S. L. Act, 1882, s. 32.

And now, money in Court under the Settled Estates Act, 1877, and liable to be laid out in the purchase of land to be made subject to a settlement, may be applied as capital money arising under the Settled Land Act, 1882: 45 & 46 Vict. c. 38, s. 32; see *post*, p. 76.

Land Drainage Act, 1845.

The expense of permanent improvements by drainage, warping, irrigation, embankment or erection of buildings, effected by a life-tenant with the sanction of the Court under the powers of the Land Drainage Act, 1845, may be raised by a charge on the inheritance, created by a Master's certificate, and repayable by a limited number of annual instalments; the life-tenant being bound to pay such instalments as become due and payable during the continuance of his title: 8 & 9 Vict. c. 56, ss. 5—10; see *Re Poynder*, 50 L. J. Ch. 753.

Public Money Drainage Act, 1846.

The expense of drainage work done under the Public Money Drainage Act, 1846, may be raised by a charge on the land, created by the certificate of the Board of Agriculture and Fisheries (in whom the powers of the Inclosure Commissioners are now vested: 52 & 53 Vict. c. 30, s. 2: 3 Ed. VII. c. 31), and repayable by a limited number of half-yearly instalments; the life-tenant being bound to pay such instalments as become payable during the continuance of his interest: 9 & 10 Vict. c. 101, ss. 34, 38; see *post*, p. 116.

Improvement of Land Act, 1864.

The expense of drainage, building and other improvements, effected by a life-tenant under the Improvement

of Land Act, 1864, with the sanction of a provisional order of the Board of Agriculture and Fisheries (in whom the powers of the Inclosure Commissioners are now vested: 52 & 53 Vict. c. 30; 3 Ed. VII. c. 31), may be raised by a charge on the inheritance, created by an absolute order of the Board and repayable by a limited number of half-yearly instalments; the life-tenant being bound to pay such instalments as become payable during the continuance of his interest: 27 & 28 Vict. c. 114, ss. 26, 27, 51, 66; and see *post*, p. 75.

Detailed specifications, and, in case of buildings, detailed plans or drawings, have to be delivered to and approved by the Board before the work is commenced: ss. 30, 31.

Improvements under Act of 1864.

The improvements authorized by this Act are the following, viz.:—

1. The drainage of land and the straitening, widening, deepening, or otherwise improving the drains, streams, and watercourses of any land:

2. The irrigation and warping of land:

3. The embanking and weiring of land from the sea or tidal waters, or from lakes, rivers, or streams, in a permanent manner:

4. The inclosing of lands, and the straitening of fences and re-division of fields:

5. The reclamation of land, including all operations necessary thereto:

6. The making of permanent farm roads, and permanent tramways and railways and navigable canals, for all purposes connected with the improvement of the estate:

7. The clearing of land:

8. The erection of labourers' cottages, farmhouses, and other buildings required for farm purposes, and the improvement of and addition to labourers' cottages, farmhouses, and other buildings for farm purposes

Chap. V.

already erected, so as such improvements or additions be of a permanent nature:

9. Planting for shelter:

10. The constructing or erecting of any engine-houses, water-wheels, saw and other mills, kilns, shafts, wells, ponds, tanks, reservoirs, dams, leads, pipes, conduits, watercourses, bridges, weirs, sluices, floodgates or hatches, which will increase the value of any lands for agricultural purposes:

11. The construction or improvement of jetties or landing places on the sea coast, or on the banks of navigable rivers or lakes, for the transport of cattle, sheep, and other agricultural stock and produce, and of lime, manure, and other articles and things for agricultural purposes; provided that the Commissioners (now the Board of Agriculture and Fisheries) shall be satisfied that such works will add to the permanent value of the lands to be charged to an extent equal to the expense thereof:

12. The execution of all such works as in the judgment of the Commissioners (now the Board of Agriculture and Fisheries) may be necessary for carrying into effect any matter hereinbefore mentioned, or for deriving the full benefit thereof: 27 & 28 Vict. c. 114, s. 9; and see p. 75.

Limited Owners Residences Acts, 1870 and 1871.

By the Limited Owners Residences Acts, 1870 and 1871, the erection or completion of a suitable mansion-house, with such other usual and necessary buildings, outhouses, and offices as are commonly appurtenant thereto, and held and enjoyed therewith, and the improvement of and addition to any such mansion-house and appurtenances, or any house capable of being converted into a suitable mansion-house, so as such improvement and addition be of a permanent nature, are to be deemed improvements within the Improvement of Land Act, 1864, and may be charged

on the estate, provided the sum charged does not exceed two years net rental of the estate: 33 & 34 Vict. c. 56, s. 4; 34 & 35 Vict. c. 84, s. 3; the rental referred to being that of the whole settled estate; see *Re Dunn*, W. N. 1877, 39; and see 62 & 63 Vict. c. 46, s. 1.

Limited Owners Reservoirs and Water Supply Act, 1877.

By the Limited Owners Reservoirs and Water Supply Further Facilities Act, 1877, the construction or erection of reservoirs or other works of a permanent character for the supply of water to persons residing or engaged in labour on the settled land, or for the more convenient or profitable use of such land, or for the supply of water to any sanitary or other local authority or water company or to any manufacturer or other person, are to be deemed an improvement within the Improvement of Land Act, 1864, provided it is shown to the satisfaction of the Board of Agriculture and Fisheries (in whom the powers of the Inclosure Commissioners are now vested: 52 & 53 Vict. c. 30; 3 Ed. VII. c. 31), that they will effect a permanent yearly increase in value of the settled land, or will be permanently productive of a yearly revenue exceeding the yearly amount proposed to be charged thereon: 40 & 41 Vict. c. 31, s. 5; and see 60 & 61 Vict. c. 44.

Extension of Improvement of Land Act.

The enumeration of improvements contained in sect. 9 of the Improvement of Land Act, 1864, is now extended so as to comprise all improvements authorized by the Settled Land Act, 1882 (45 & 46 Vict. c. 38, s. 30); besides which, the provisions of the Act as to the period for repayment of the sum raised and the land to be comprised in the charge have recently been extended by the Act, 62 & 63 Vict. c. 46; and although the provisions of the Settled Land Acts are more favourable to life-tenants, it may still be desirable to resort to

Chap. V.

the powers of the Act of 1864 in certain cases; for example, where there is no capital money in hand; see *post*, p. 86.

Settled Land Act, 1882, sect. 25.

A life-tenant is entitled to have capital money arising under the Settled Land Act, 1882, applied in payment for any improvement authorized by the Act, provided the requirements of the 26th section are complied with: 45 & 46 Vict. c. 38, s. 21 (iii), s. 22 (2).

The improvements authorized by the Act, are the making or execution on or in connexion with, and for the benefit of, the settled land, of any of the following works, or of any works for any of the following purposes, and any operation incident to, or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes (namely):—

(1) Drainage, including the straightening, widening, or deepening of drains, streams, and watercourses:

(2) Irrigation, warping:

(3) Drains, pipes, and machinery for supply and distribution of sewage as manure:

(4) Embanking or weiring from a river or lake, or from the sea, or a tidal water:

(5) Groynes; sea walls; defences against water:

(6) Inclosing; straightening of fences, re-division of fields:

(7) Reclamation; dry warping:

(8) Farm roads; private roads; roads or streets in villages or towns:

(9) Clearing; trenching; planting:

(10) Cottages for labourers, farm servants, and artisans, employed on the settled land or not:

(11) Farmhouses, offices and outbuildings, and other buildings for farm purposes:

(12) Saw-mills, scutch-mills and other mills, water-

wheels, engine-houses, and kilns, which will increase the value of the settled land for agricultural purposes or as woodland or otherwise:

(13) Reservoirs, tanks, conduits, watercourses, pipes, wells, ponds, shafts, dams, weirs, sluices, and other works and machinery for supply and distribution of water for agricultural, manufacturing or other purposes, or for domestic or other consumption:

(14) Tramways; railways; canals; docks:

(15) Jetties, piers, and landing places on rivers, lakes, the sea or tidal waters, for facilitating transport of persons and of agricultural stock and produce, and of manure and other things required for agricultural purposes, and of minerals, and of things required for mining purposes:

(16) Markets and market places:

(17) Streets, roads, paths, squares, gardens, or other open spaces, for the use, gratuitously or on payment, of the public or of individuals, or for dedication to the public, the same being necessary or proper in connexion with the conversion of land into building land:

(18) Sewers, drains, watercourses, pipe-making, fencing, paving, brick-making, tile-making, and other works necessary or proper in connexion with any of the objects aforesaid:

(19) Trial pits for mines, and other preliminary works necessary or proper in connexion with development of mines:

(20) Reconstruction, enlargement, or improvement of any of those works: 45 & 46 Vict. c. 38, s. 25: see *post*, pp. 80, 81.

Settled Land Act, 1890, sect. 13.

By the Settled Land Act, 1890, the improvements authorized by the Act of 1882, are extended so as to include the following; namely,

(1) Bridges;

(2) Making any additions to or alterations in buildings

Chap. V.

reasonably necessary or proper to enable the same to be let;

(3) Erection of buildings in substitution for buildings within an urban sanitary district taken by a local or other public authority, or for buildings taken under compulsory powers, but so that no more money be expended than the amount received for the buildings taken and the site thereof;

(4) The rebuilding of the principal mansion-house on the settled land; provided that the sum to be applied under this sub-section shall not exceed one-half of the annual rental of the settled land: 53 & 54 Vict. c. 69, s. 13: see *post*, pp. 81, 82, 83.

Housing of the Working Classes Act, 1890.

The improvements authorized by the Settled Land Act, 1882, are further extended by the Housing of the Working Classes Act, 1890, so as to include any dwellings available for the working classes, the building of which in the opinion of the Court is not injurious to the estate: 53 & 54 Vict. c. 70, s. 74 (re-enacting 48 & 49 Vict. c. 72, s. 11). And this section is to have effect as if the expression 'working classes' included all classes of persons who earn their livelihood by wages or salaries, where the buildings are of a rateable value not exceeding £100 per annum: 53 & 54 Vict. c. 69, s. 18.

The effect of these enactments is to incorporate the specified improvements in sect. 25 (x) of the Settled Land Act, 1882: see *Re Calverley*, (1904) 1 Ch. at p. 156.

Agricultural Holdings Acts, 1883 to 1900, and 1908.

Capital money arising under the Settled Land Acts, 1882 to 1890, may also be applied in payment, as for an improvement authorized by those Acts, of any moneys expended and costs incurred by a landlord under or in pursuance of the Agricultural Holdings (England) Acts, 1883 to 1900, or the Agricultural Holdings Act, 1908, in or about the execution of any of the following

improvements, as if authorized by such Settled Land Acts, viz.,

(1) Erection, alteration, or enlargement of buildings.

(2) Formation of silos.

(3) Laying down of permanent pasture.

(4) Making and planting of osier beds.

(5) Making of water meadows or works of irrigation.

(6) Making of gardens.

(7) Making or improving of roads or bridges.

(8) Making or improving of watercourses, ponds, wells, or reservoirs, or of works for the application of water power or for supply of water for agricultural or domestic purposes.

(9) Making or removal of permanent fences.

(10) Planting of hops.

(11) Planting of orchards or fruit bushes.

(12) Protecting young fruit trees.

(13) Reclaiming of waste land.

(14) Warping or weiring of land.

(15) Embankments and sluices against floods.

(16) Erection of wirework in hop gardens.

(17) Drainage: 46 & 47 Vict. c. 61, s. 29; 63 & 64 Vict. c. 50, Sched. I. (substituted for Sched. I. of the Act of 1883 by 63 & 64 Vict. c. 50, s. 1); 8 Ed. VII. c. 28, s. 20.

Settled Land Acts code.

The Settled Land Acts contain a complete code of rules as to the application of capital money arising under the Acts, so that it cannot be applied for any other purposes than those expressly mentioned: *Re Gerard*, (1893) 3 Ch. 252; *Re Blagrave*, (1903) 1 Ch. 560; except under some special provision in the settlement: see *Re Egmont*, 16 Times L. R. 360.

Consequently, capital money cannot be applied in building chapels or houses of a kind not mentioned in the Act, or stables for the mansion-house (unless within sect. 13 of the Act of 1890): *Re Gerard*, (1893) 3 Ch. 252; *Re Lisburne*, (1901) W. N. 91.

Chap. V.

It is to be observed that, with a few exceptions introduced by the later Acts, the improvements authorized are all calculated to render the settled land more remunerative: see *Re Gerard*, (1893) 3 Ch. at p. 262; but capital money cannot be applied in pulling down and rebuilding houses for the mere purpose of increasing the rental or capital value of the estate: *Re Montagu*, (1897) 2 Ch. 8.

Examples:—

Drainage in sect. 25 (i) includes an improved system of drainage of the mansion-house, or other houses on the estate: *Re Houghton*, 30 Ch. D. 102; *Re Leconfield*, (1907) 2 Ch. 340; *Re Thomas*, (1900) 1 Ch. 319; but not mere alterations in such drainage: *Re Tucker*, (1895) 2 Ch. 468.

Inclosing in sect. 25 (vi) includes the erection of new fences in the place of rotten ones, and fences dividing a park for grazing purposes: *Re Verney*, (1898) 1 Ch. 508; and fences separating the park from the garden: *Re Leveson Gower*, 53 W. R. 524; also garden walls, whether replacing ruined walls or inclosing more ground: *Re Dunraven*, (1907) 2 Ch. 417; but not stone walls without mortar for dividing fields: *Re Marlborough*, 8 Times L. R. 201.

Cottages for Labourers in sect. 25 (x) include a gardener's cottage: *Re Lisburne*, (1901) W. N. 91; but not a house for the estate agent: *Re Gerard*, (1893) 3 Ch. 253 (overruling, on this point, *Re Houghton*, 30 Ch. D. 102).

Farm buildings in sect. 25 (xi) do not include stables for the mansion-house: *Re Gerard*, (1893) 3 Ch. 252; *Re Lisburne*, (1901) W. N. 91. Silos were not allowed under this section in 1885 (when ensilage was still in the experimental stage): see *Re Broadwater Estate*, 54 L. J. Ch. 1104; but see now the Agricultural Holdings (England) Acts, *ante*, p. 79.

Mills in sect. 25 (xii) mean mills for agricultural

purposes, and do not include a silk and cotton mill: *Re Harrington*, 75 L. J. Ch. 460.

Engine-houses in sect. 25 (xii) do not include engine-houses for supplying the mansion-house with electric light: *Re Leconfield*, (1907) 2 Ch. 340.

Water supply in sect. 25 (xiii) includes a supply to the mansion-house or farms: *Re Houghton*, 30 Ch. D. 102; *Re Tucker*, (1895) 2 Ch. 468; *Re Kensington*, 21 Times L. R. 351; including the supply of hot water: *Re Leconfield*, (1907) 2 Ch. 340; and fire-hydrants, hose and apparatus: *Re Dunraven*, (1907) 2 Ch. 417; but not hot-water pipes for heating the house: *Re Gaskell*, (1894) 1 Ch. at p. 488.

Works in connection with mines in sect. 25 (xix) include a new pumping-engine and pumps for draining: *Re Mundy*, (1891) 1 Ch. 399.

Reconstruction in sect. 25 (xx) seems to refer to any of the works mentioned in the Act, however and whenever made: see *Re Dunraven*, (1907) 2 Ch. at p. 423; *Re Calverley*, (1904) 1 Ch. at p. 156; so as to include replacing the thatch roof of a farm building with galvanized iron: *Re Verney*, (1898) 1 Ch. 508; but evidence that the re-roofing is a permanent improvement, and does not fall under the head of repairs, is necessary: *Re Newton*, W. N. 1890, 24; see, however, the cases under sect. 13 of the S. L. Act, 1890, *infra*.

Works mentioned in sub-sect. xix. may be reconstructed though no longer preliminary: *Re Mundy*, (1891) 1 Ch. 399.

Cases on S. L. Act, 1890, s. 13.

The 13th section of the Settled Land Act, 1890, is supplemented by the general words in the first paragraph of sect. 25 of the Act of 1882, set out at p. 76: see *Re Blagrave*, (1903) 1 Ch. at p. 562.

The question whether any particular works are 'additions and alterations' within sect. 13 (2) or amount to a 'rebuilding' within sect. 13 (4) of the Act of 1890,

Chap. V.

Additions and alterations.

is one of fact (see *Re Walker*, (1894) 1 Ch. 189; *Re Kensington*, 21 Times L. R. 351); but it has been held that additions and alterations under sect. 13 (2) must be structural and must be made to existing buildings: *Re Gaskell*, (1894) 1 Ch. 485; *Re Clarke*, (1902) 2 Ch. 327; *Re Blagrave*, (1903) 1 Ch. 560.

Capital money may not be expended on additions or alterations under sect. 13 (2) unless there is an immediate intention of letting, as distinguished from occupation by the life-tenant: *Re De Teissier*, (1893) 1 Ch. 153; *Re Gerard*, (1893) 3 Ch. 252; but the fact of a tenant being in occupation does not exclude the section; it is sufficient if there is an intention to let at the expiration of an existing tenancy: *Stanford* v. *Roberts*, (1901) 1 Ch. 440; *Re Calverley*, (1904) 1 Ch. 150.

The additions or alterations must be 'reasonably necessary or proper,' *i.e.* although they need not be absolutely necessary, they must be such as a prudent owner would make: *Stanford* v. *Roberts*, (1901) 1 Ch. 440.

Examples of additions and alterations within the section:—

A new floor, necessitated by dry rot: *Stanford* v. *Roberts*, (1901) 1 Ch. 440; a new roof and entrance: *Re Gaskell*, (1894) 1 Ch. 485; a billiard-room: *Re De Teissier*, (1893) 1 Ch. at p. 156; a washhouse and privy: *Re Calverley*, (1904) 1 Ch. 150; a new system of drainage, and (*semble*) a bath and hot-water supply: *Standing* v. *Gray*, (1903) 1 I. R. 49; the rearrangement of the bar of a public house required by the licensing authority: *Re Gurney*, (1907) 2 Ch. 496; and (*semble*) stables: *Re Gerard*, (1893) 3 Ch. at p. 260; see *Re Leveson Gower*, 53 W. R. 524.

Examples of works which are not additions or alterations within the section:—

The erection of an entirely new vinery and peach-house in the place of dilapidated glasshouses: *Re*

Leveson Gower, (1905) 2 Ch. 95; alterations in drainage and sanitary arrangements, not amounting to a new system: *Re Tucker*, (1895) 2 Ch. 468; hot-water pipes and heating apparatus: *Re Gaskell*, (1894) 1 Ch. 485; electric light installation: *Re Clarke*, (1902) 2 Ch. 327; *Re Blagrave*, (1903) 1 Ch. 560 (not following *Re Freake*, (1902) 1 Ch. 97); and (*semble*) a detached engine-house: *Ib.*; and the lengthening of the shaft of a silk and cotton mill to enable it to be driven by steam: *Re Harrington*, 75 L. J. Ch. 460.

Rebuilding.

Rebuilding, in sect. 13 (4) of the Settled Land Act, 1890, includes reconstruction of part of the mansion-house: *Re Walker*, (1894), 1 Ch. 189; and (*semble*) stables, if part of the mansion-house: *Re Gerard*, (1893) 3 Ch. 252; but not a detached laundry: *Re Dunraven*, (1907) 2 Ch. 417; nor structural alterations or repairs: *Re De Teissier*, (1893) 1 Ch. 153; *Re Wright*, 83 L. T. 159.

Capital money cannot be applied under this section in rebuilding an old-fashioned or ugly mansion-house if it is in good condition: *Re Gerard*, (1893) 3 Ch. 252; but the cost of rebuilding necessitated by dry rot has been allowed: *Re Legh*, (1902) 2 Ch. 274.

The sum applied must not exceed one-half of the 'annual rental,' *i.e.* the total income of all the settled property, both land and capital money invested: *Re De Teissier*, (1893) 1 Ch. 153; *Re Gerard*, (1893) 3 Ch. 252; including the rental of property usually let, though for the time being empty, but without taking into account property occupied by the life-tenant: *Re Walker*, (1894) 1 Ch. 189; and without deducting the cost of repairs: *Re Kensington*, 21 Times L. R. 351.

Conflict of powers.

The Settled Land Acts do not affect any powers exercisable by the life-tenant or the trustees under a settlement, or by statute or otherwise; but in case of conflict between the provisions of the settlement and the provisions of the Settled Land Acts, relative to

Chap. V.

any matter in respect whereof the life-tenant exercises any power under those Acts, the provisions of the Acts prevail: 45 & 46 Vict. c. 38, s. 56.

Accordingly, improvements effected under the powers of the Settled Land Acts are payable out of capital, notwithstanding a trust for management under which they are, at the trustees' discretion, payable out of income: *Clarke* v. *Thornton*, 35 Ch. D. 307; *Re Stamford*, 56 L. T. 484; *Vine* v. *Raleigh*, (1891) 2 Ch. 13; or a direction for payment of all incidental expenses and outgoings out of income: *Re Thomas*, (1900) 1 Ch. 319; but if the powers of the settlement are exercised the provisions of the settlement have to be followed, so long as the powers of the Acts are not resorted to: *Re Sudbury & Poynton*, (1893) 3 Ch. 74 (where the order was made without prejudice to any application under sect. 15 of the Settled Land Act, 1890); and see *Re Thomas*, (1900) 1 Ch. at p. 324.

The life-tenant's rights are the same whether the money is in the hands of the trustees or in Court: see *Clarke* v. *Thornton*, 35 Ch. D. at p. 314.

Scheme.

A scheme for the execution of the improvements, showing the proposed expenditure, must be submitted to and approved by the trustees of the settlement (if the capital money is in their hands), or, if it is in Court, the scheme must be submitted to and approved by the Court: 45 & 46 Vict. c. 38, s. 26; and this must be done before the work is commenced, otherwise it cannot be paid for out of capital money: *Re Hotchkin*, 35 Ch. D. 41; unless an order of the Court is obtained under sect. 15 of the Settled Land Act, 1890 (53 & 54 Vict. c. 69), sanctioning such payment: see *Re Egmont*, (1908) W. N. 176.

Extras.

But extra expenditure, incidental to and necessary for the proper execution of the scheme, may be allowed out of capital, unless the trustees' approval is conditional

on the estimate not being exceeded: *Re Lytton*, 38 Ch. D. 20; *Re Egmont*, (1908) W. N. 176.

Trustees' discretion.

Besides the duty of satisfying themselves that the proposed works are authorized by the Acts, the trustees have a discretion as to whether the works are too small for the expense of an application for payment out of capital to be incurred: see *Re Calverley*, (1904) 1 Ch. at p. 155.

Certificate.

A certificate that the work has been properly executed and what amount is properly payable must be obtained from the Board of Agriculture and Fisheries or from a competent engineer or able practical surveyor nominated by the trustees and approved by the Board of Agriculture and Fisheries or the Court before the trustees can apply capital money in payment, unless an order for payment is made by the Court (s. 26): see *Re Millard*, (1893) 3 Ch. at p. 120.

S. L. Act, 1890, s. 15.

The 15th section of the Settled Land Act, 1890, enables the Court to order capital money to be applied in payment for improvements authorized by the Settled Land Acts, 1882 to 1890, although executed without a scheme, either by the life-tenant or by the trustees: *Re Thomas*, (1900) 1 Ch. 319.

This section is retrospective, and enables the Court to sanction payment for improvements made before the Act of 1890, though not for improvements made before the Act of 1882: see *Re Ormrod*, (1892) 2 Ch. 318.

The section is not excluded by a trust for sale: *Re Wormald*, (1908) W. N. 214; nor by the fact of the improvements having been already paid for by the life-tenant; but the Court takes a narrower view as to what are improvements under this section than where there is a scheme: see *Re Tucker*, (1895) 2 Ch. 468; *Re Egmont*, 16 Times L. R. 360; and applications for sanctioning trifling improvements are not encouraged: see *Re Calverley*, (1904) 1 Ch. at p. 155.

Chap. V.

The Court has a discretion under this section, which in several cases it has refused to exercise contrary to the express directions of the settlement: see *Re Partington*, (1902) 1 Ch. 711; *Cardigan* v. *Curzon-Howe*, 9 Times L. R. 244; but it would seem that the exercise of the discretion should be guided by the consideration of what is fair as between the life-tenant and remainderman, having regard to the nature of the work done; and that if it consists of permanent improvements likely to benefit the remainderman, and not rendered necessary by the neglect of the life-tenant, the cost should be allowed out of capital: see *Re Tucker*, (1895) 2 Ch. at p. 471; *Re Thomas*, (1900) 1 Ch. at pp. 324, 325; and see *Re Bristol*, (1893) 3 Ch. at p. 167; *Re Legh*, (1902) 2 Ch. 274.

Where no capital money in hand.

The trustees of the settlement can approve a scheme although there may be no capital money in hand: *Re Norfolk*, (1900) 1 Ch. 461; and in such a case, the Court will, if required, decide whether the proposed improvements are within the Act: *Re Calverley*, (1904) 1 Ch. 150; but a prospective order will not be made for application of future capital money in paying for either future or past improvements, as payment can only be sanctioned when the work has been done and the capital money is in hand: *Re Millard*, (1893) 3 Ch. 116; *Re Bristol*, (1893) 3 Ch. 161; and there is no power to charge the estate: *Standing* v. *Gray*, (1903) 1 I. R. 49; but see *ante*, p. 73.

When works have been executed and paid for by the life-tenant under an approved scheme, and capital money afterwards becomes available, the trustees may reimburse the life-tenant the sum so expended by him without the sanction of the Court, subject to the proper certificate being obtained: *Re Norfolk*, (1900) 1 Ch. 461.

It is doubtful whether the expenses of improvements

can be allowed out of capital money under the Act after the land has been sold: *Re Hotchkin*, 35 Ch. D. 41.

As to applying capital money arising under one settlement in payment for improvements on another estate similarly settled, see *Re Byng*, (1892) 2 Ch. 219.

CHAPTER VI.

RENEWAL AND ENFRANCHISEMENT.

Chap. VI.

Renewal expenses.

Before Lord Thurlow's time, the practice was for the life-tenant to pay one-third, and the remainderman two-thirds of the fines on renewal of leases : see *Verney* v. *Verney*, 1 Ves. Sen. 428; although, in some cases, the life-tenant was only ordered to keep down the interest on the amount raised: see *Lawrence* v. *Maggs*, 1 Eden, 453; *Buckeridge* v. *Ingram*, 2 Ves. Jun. 652.

Present rule. Leaseholds for years.

But according to the present rule, in the absence of any provision in the settlement to the contrary, the fines and expenses of renewing leaseholds for years have to be borne by the life-tenant and remainderman in proportion to their actual enjoyment of the renewed lease: *Rawe* v. *Chichester*, Amb. 715; *Nightingale* v. *Lawson*, 1 Bro. C. C. 440; *White* v. *White*, 9 Ves. 554; *Giddings* v. *Giddings*, 3 Russ. 241; *Shaftesbury* v. *Marlborough*, 2 M. & K. 111; *Jones* v. *Jones*, 5 Ha. 440; *Hudleston* v. *Whelpdale*, 9 Ha. 775; *Bradford* v. *Brownjohn*, 3 Ch. 711.

Leaseholds for lives.

The fines and expenses of renewing leaseholds for lives are apportionable in the same way: *White* v. *White*, 9 Ves. 554; *Allan* v. *Backhouse*, 2 V. & B. 65; *Shaftesbury* v. *Marlborough*, 2 M. & K. 111; *Cridland* v. *Luxton*, 4 L. J. Ch. 65; *Jones* v. *Jones*, 5 Ha. 440; the value of the *cestuis que vie's* lives being assumed at the expectation given in the tables framed for the purpose; see *Bradford* v. *Brownjohn*, 3 Ch. at p. 714.

Actuarial calculation.

The inconvenience of the above rule is that the

proportion of fines and expenses payable by each party cannot in general be ascertained before the death of the life-tenant; and in order to avoid this delay the Court has sometimes resorted to an actuarial calculation for determining the amount of the benefit derived by the life-tenant: see *Reeves* v. *Creswick*, 3 Y. & C. 715; *Re Baring*, (1893) 1 Ch. 61.

But the point does not appear to have been argued in either of those cases, and the rule is well settled that the proportions in which the fines and expenses are to be borne must be determined by the actual enjoyment of the parties, and not by an actuarial calculation of their probable enjoyment: see *Jones* v. *Jones*, 5 Ha. 440; *Bradford* v. *Brownjohn*, 3 Ch. 711.

Where life-tenant not benefited.

If the life-tenant derives no benefit from the renewal, as where he is already a *cestui que vie*, or dies during the original term, the fine and expenses fall entirely on capital, unless a contrary intention appears by the settlement: *Nightingale* v. *Lawson*, 1 Bro. C. C. 440; *Adderley* v. *Clavering*, 2 Cox, 192; *Harris* v. *Harris*, 32 Beav. 333; *Isaac* v. *Wall*, 6 Ch. D. at p. 716.

When remainderman not benefited.

Conversely, if the remainderman derives no benefit from the renewal by reason of the life-tenant outliving the period for which he renewed, the whole expense has to be borne by income: see *Lawrence* v. *Maggs*, 1 Eden, 453.

Settlor's liability.

As to the liability of the settlor's estate, in respect of a covenant by him to renew, where the leaseholds are settled by his will, see *Trail* v. *Jackson*, 46 L. J. Ch. 684.

Renewal by life-tenant.

If the life-tenant advances the amount required for the renewal fine, he is entitled to a charge on the estate for the amount payable by the remainderman: *Adderley* v. *Clavering*, 2 Cox, 192; see *Jones* v. *Jones*, 5 Ha. at p. 465; but he cannot claim to be recouped in his lifetime,

Chap. VI.

as the extent of his enjoyment cannot be ascertained until his death: *Harris* v. *Harris*, 32 Beav. 333.

The amount payable by the remainderman in such a case has been held to carry compound interest at 4 per cent. until the life-tenant's death, and then simple interest at the same rate until payment: *Nightingale* v. *Lawson*, 1 Bro. C. C. 440; *Giddings* v. *Giddings*, 3 Russ. 241; *Cridland* v. *Luxton*, 4 L. J. Ch. 65; *Bradford* v. *Brownjohn*, 3 Ch. 711; and it is conceived that interest is still payable at the same rate, notwithstanding the reduced rate of interest now obtainable from trust securities, as the rule regulating the rate of interest payable to a life-tenant of residue in respect of unauthorized investments has no application to interest payable on advances: see *Re Davy*, (1908) 1 Ch. 61.

Renewal fine raised by mortgage.

If the renewal fine is raised by mortgage, the life-tenant is bound to keep down the interest, and may be required to give security for providing at his death the amount of his presumptive share, which may be ascertained prospectively by inquiry; and if he lives longer than is estimated, he may be called on to increase such security: *White* v. *White*, 9 Ves. 554; *Jones* v. *Jones*, 5 Ha. 440; *Hudleston* v. *Whelpdale*, 9 Ha. 775.

But the life-tenant's income cannot be impounded to provide for a future renewal: *Hudleston* v. *Whelpdale*, 9 Ha. 775; see *Isaac* v. *Wall*, 6 Ch. D. at p. 716.

In one case, the life-tenant's presumptive share of the cost of renewal was ordered to be secured by a policy of assurance on his life, directions being given for paying the premiums as well as the interest on the mortgage out of the rents: *Reeves* v. *Creswick*, 3 Y. & C. 715.

In other cases, an assurance on the life of the *cestui que vie* has been resorted to: see *Shaftesbury* v. *Marlborough*, 2 M. & K. 111; *Greenwood* v. *Evans*, 4 Beav. 44; although this seems to be contrary to principle, as

the amount to be secured should be payable at the death of the life-tenant: see *Hudleston* v. *Whelpdale*, 9 Ha. 775.

Special provisions.

The general rule apportioning the burden of renewal fines and expenses according to actual enjoyment, may be excluded by any provision in the settlement which shows a contrary intention: the question whether any provision has this effect, being one of construction in each case; but where the settlement only provides for raising a limited amount, the ordinary rule of apportionment according to enjoyment applies as to any further sum received: *Jones* v. *Jones*, 5 Ha. 440; *Plumtre* v. *Oxenden*, 25 L. J. Ch. 19.

It requires a clear direction in the settlement to make renewal expenses payable entirely out of income: see *Capel* v. *Wood*, 4 Russ. 500.

Thus, the general rule is not excluded by a direction for renewal expenses 'to be raised and paid out of the rents and profits;' although such a direction authorizes a sale or mortgage: *Allan* v. *Backhouse*, 2 V. & B. 65; Jac. 631; nor is it excluded by a discretionary trust to raise renewal fines out of the rents or by mortgage, whether the trust is executed by the trustees (*Ainslie* v. *Harcourt*, 28 Beav. 313), or by the Court (*Jones* v. *Jones*, 5 Ha. 440); but see *Milles* v. *Milles*, 6 Ves. 761 (where the custom was to renew annually), and *Milsintown* v. *Portmore*, 3 Madd. 491; 5 Madd. 471 (where the settlement was by deed), in both of which cases a similar power was held to throw the cost of renewal on the rents: and see *Playters* v. *Abbott*, 2 M. & K. 97; *post*, p. 94.

Where, however, there is an overriding trust to renew and pay the expenses out of the rents, the renewal expenses fall on the life-tenant: *Shaftesbury* v. *Marlborough*, 2 M. & K. 111; *Montfort* v. *Cadogan*, 17 Ves. 485; 19 Ves. 635; see *Stone* v. *Theed*, 2 Bro. C. C. 243; 5 Ha. 451 n.; *Hulkes* v. *Barrow*, Taml. 264.

Chap. VI.

So, a trust to pay renewal fines 'out of the annual rents and profits,' with power to raise any deficiency by mortgage, makes the fines payable out of income, if sufficient: *Solley* v. *Wood*, 29 Beav. 482.

But where successive life-tenants of leaseholds for lives are required to keep the lives full, each is only bound to fill up vacancies occurring in his own life-time, and the cost of making any renewal neglected by a life-tenant who dies insolvent, falls on capital: *Wadley* v. *Wadley*, 2 Coll. 11.

A trust to raise renewal fines by sale or mortgage, throws the burden on capital: the life-tenant losing the rents of the part sold, or having to keep down the interest in the case of a mortgage: *Plumtre* v. *Oxenden*, 25 L. J. Ch. 19; *Ainslie* v. *Harcourt*, 28 Beav. 313; and a direction to raise renewal fines by sale, seems to have the same effect: see *Jones* v. *Jones*, 5 Ha. at p. 461.

As to renewal of leaseholds settled by way of trust for sale, see *Keir* v. *Robins*, 2 Jur. 773.

Trustee Act, 1893, s. 19.

A trustee of renewable leaseholds is in certain cases empowered and required to renew and pay money required for the renewal out of any trust moneys in his hands, or to raise the amount by mortgage: 56 & 57 Vict. c. 53, s. 19 (re-enacting 51 & 52 Vict. c. 59, ss. 10, 11); but this enactment seems not to affect the rights of the life-tenant and remainderman *inter se*: see *Re Baring*, (1893) 1 Ch. at p. 65.

Failure to renew.

If trustees omit to renew out of the rents as directed by the settlement, the life-tenant's estate is liable to make good the amount which ought to have been deducted from the rent paid to him: *Montfort* v. *Cadogan*, 17 Ves. 485; 19 Ves. 635.

If the life-tenant fails to renew as directed in the settlement, the Court may (it seems) appoint a receiver

of the rents, so as to raise a renewal fund: see *Bennett* v. *Colley*, 2 M. & K. at p. 233; and his estate is at his death liable to the remainderman for the damage he sustains by reason of the failure to renew: *Bennett* v. *Colley*, 2 M. & K. 225.

And where the failure to renew out of the rents was owing to the demand of an exorbitant fine, the life-tenant's estate was held liable for the amount which would have been raised out of the rents if renewal had taken place at the usual time and reasonable fines had been paid: *Colegrave* v. *Manby*, 2 Russ. 238.

Purchase of reversion.

If the life-tenant of settled leaseholds purchases the reversion, so that it becomes subject to the trusts of the settlement, he is entitled to a charge for the whole purchase-money, which carries interest at 4 per cent. from his death: *Mason* v. *Hulke*, 22 W. R. 622; *Isaac* v. *Wall*, 6 Ch. D. 706; *Rowley* v. *Ginnever*, (1897) 2 Ch. 503.

23 & 24 Vict. c. 124.

Where the reversion on an ecclesiastical lease is purchased, and the purchase-money raised by trustees, under the powers of the Ecclesiastical Commissioners' Act, 1860 (23 & 24 Vict. c. 124, ss. 20, 35, 36, 37), it is conceived that the payment is properly treated as a capital expenditure; although the Court has refused to sanction such a purchase where it would have had the effect of seriously reducing the life-tenant's income: *Hayward* v. *Pile*, 5 Ch. 214; unless there was an overriding trust for renewal out of income: *Hollier* v. *Burne*, 16 Eq. 163.

S. L. Act, 1882, s. 21.

And now, the reversion or freehold in fee of settled leaseholds may be purchased out of capital money arising under the Settled Land Act, 1882: 45 & 46 Vict. c. 38, s. 21 (vi); or the purchase money may be raised by mortgage under sect. 18: *Re Bruce*, (1905) 2 Ch. 372.

Copyhold fines.

Copyhold fines payable on a life-tenant's admittance

Chap. VI.

which enures for the benefit of the remainderman, stand on the same footing as renewal fines in the case of leaseholds, and have to be borne by the life-tenant and remainderman in proportion to the benefits which they actually derive from the admittance: see *Playters* v. *Abbott*, 2 M. & K. at p. 109; *Carter* v. *Sebright*, 26 Beav. 374; but if the life-tenant is only admitted for his life he has to bear the whole fine: see *Carter* v. *Sebright*, 26 Beav. at p. 376; and see *Fitzwilliams* v. *Kelly*, 10 Ha. 266, as to the liability of the settlor's estate where he has covenanted to pay the fines.

The same rule applies where only the equitable interest in copyholds is settled; so that, in the absence of any provision in the settlement, fines paid on the admittance of new trustees have to be borne by the life-tenant and remainderman in proportion to the benefits which they actually derive from the admittance; *Carter* v. *Sebright*, 26 Beav. 374; *Re Bullock*, 91 L. T. 651; and where the fines are not paid by the life-tenant in the first instance, he must give security that he will bear his due share: *Carter* v. *Sebright*, 26 Beav. 374; and see *Bull* v. *Birkbeck*, 2 Y. & C. Ch. 447 (where the order was by consent).

Special provisions.

But this rule may be excluded if a contrary intention is shown by the settlement, as in the case of fines for renewal of leaseholds: see *ante*, p. 91.

Trust to raise.

Thus, where copyholds were devised upon trust to raise the fines on admittance 'out of the rents and profits or by mortgage, sale or other disposition,' and subject thereto to pay the clear rents to the life-tenant, the fines were ordered to be raised by mortgage, and the life-tenant was held liable only to keep down the interest: *Playters* v. *Abbott*, 2 M. & K. 97.

Enfranchisement.

Where settled copyholds are enfranchised compulsorily at the instance of the lord, and the life-tenant pays the enfranchisement money, he is entitled to a charge for the

amount, which carries interest from his death: *Isaac* v. *Wall*, 6 Ch. D. 706.

Copyhold Act, 1894.

Where the lord of a manor being only life-tenant, purchases a tenant's interest, and charges the land with the purchase money under the powers of the Copyhold Act, 1894 (57 & 58 Vict. c. 46, s. 36 (3)), it is conceived that he is only bound to keep down the interest on the charge as in the case of other incumbrances (see *post*, p. 106).

So, where the life-tenant of copyholds effects an enfranchisement, and charges the land with the enfranchisement money under the Copyhold Act, 1894 (57 & 58 Vict. c. 46, s. 36 (1)), it is apprehended that he is under no greater liability.

S. E. Act, 1877.

Where enfranchisement is obtained for the purpose of effecting a sale under the Settled Estates Act, 1877, the cost of the enfranchisement may be allowed out of the proceeds of sale: see *Re Adair*, 16 Eq. 124.

S. L. Act, 1882.

And now, money required for enfranchisement may be paid out of capital money arising under the Settled Land Act, 1882 (45 & 46 Vict. c. 38, s. 21 (v)); or may be raised by mortgage under sect. 18; see *Re Bruce*, (1905) 2 Ch. 372; and if raised by mortgage, it is conceived that the life-tenant is only liable to keep down the interest.

CHAPTER VII.

COSTS AND EXPENSES.

Trustees' costs.

Although trustees have no power to charge against income, costs which ought to be borne by capital: *Re Weall*, 42 Ch. D. 674; they are entitled to retain such costs out of income until they can be raised out of capital: *Stott* v. *Milne*, 25 Ch. D. 710.

Succession duty account.

The costs of preparing and rendering a succession duty account in respect of the life-tenant's interest under a will, are payable out of income: *Cowley* v. *Wellesley*, 1 Eq. 656.

Estate duty account.

But it is conceived that the costs of an account rendered for purposes of estate duty, which is a charge on capital (see 57 & 58 Vict. c. 30, s. 9), are properly payable out of capital.

Executing trusts.

The costs of carrying into execution the trusts of a will, being incurred for the benefit of the whole estate, are in general payable out of capital: see *Bainbridge* v. *Blair*, 4 L. J. Ch. 207; and where settled residue comprised capital left in a business, the expenses of a yearly audit and stocktaking which had been stipulated for by the testator, were held to be payable out of capital: *Re Bennett*, (1896) 1 Ch. 778.

Audit and stocktaking.

Public trustee.

But the incidence of the fees and expenses of the Public Trustee under the 9th section of the Public Trustee Act, 1906, as between capital and income, are determinable by him: 6 Ed. VII. c. 55, s. 9; while the remuneration of the auditor and the other expenses of the investigation and audit of the trust accounts under

Audit under Act of 1906.

the Act, are to be borne by the estate, unless the Public Trustee otherwise directs: 6 Ed. VII. c. 55, s. 13.

Surveys and notices to repair.

The costs of surveys and notices to repair, made and given for the purpose of enforcing tenants' covenants to repair houses settled by way of trust for sale, are payable out of capital: *Re McClure*, 76 L. J. Ch. 52.

Receiver.

If it becomes necessary to appoint a receiver of the rents, the receiver's poundage, and the costs of passing his accounts, are payable out of income: *Shore* v. *Shore*, 4 Dr. 501; see *Bainbridge* v. *Blair*, 4 L. J. Ch. 207.

Investment.

The costs of investing trust funds pursuant to a direction contained in the settlement, are payable out of capital; but where the life-tenant voluntarily paid the trustees' costs of investment, his executors were held to have no right to be recouped out of capital: *Horlock* v. *Smith*, 17 Beav. 572.

The costs of a proper application by trustees for advice as to investment, are payable out of capital: *Hume* v. *Richardson*, 8 Jur. N. S. 686; *Re Knowles*, 18 L. T. 809.

Appointment of new trustees.

The costs of appointing new trustees come out of capital: see *Carter* v. *Sebright*, 26 Beav. at p. 377; *Harvey* v. *Olliver*, W. N. 1887, 149; including the costs of any necessary application to the Court: *Re Parby*, 29 L. T. O. S. 72; *Re Wood*, 7 Jur. N. S. 323; and so do the costs of obtaining a vesting order: *Ex p. Davies*, 16 Jur. 882; but see *Re Sheppard*, 7 L. T. 377 (where the petition was presented by remaindermen only contingently entitled); and see *post*, p. 104.

Where only one trustee is appointed by the will, and the fund is large, the costs of appointing an additional trustee are allowed out of capital: *Grant* v. *Grant*, 34 L. J. Ch. 641; *Re Ratcliff*, (1898) 2 Ch. 352; but where the fund was small, and the reversioners petitioned for

Chap. VII.

the appointment of a second trustee, they were ordered to pay the costs: *Re Brackenbury*, 10 Eq. 45; and see *Finlay* v. *Howard*, 2 Dru. & W. 490.

Where a suit by trustees to be discharged was occasioned by the life-tenant's acts, the costs were ordered to be paid out of income: *Coventry* v. *Coventry*, 1 Keen, 758.

Settlement by ward.

The costs of a settlement of the property of an infant ward of Court are payable out of capital: *De Stacpoole* v. *De Stacpoole*, 37 Ch. D. 139; and see *Anon.*, 4 Russ. 473.

Payment into Court under Trustee Act, 1893.

The costs of paying a trust fund into Court, under the 42nd section of the Trustee Act, 1893, seem to come out of capital, as in cases of payment into Court under the Trustee Relief Acts, which it replaces: see *Re Staples*, 13 Jur. 273; *Re Ingram*, 2 W. R. 679; *Re Whitton*, 8 Eq. 352.

Payment out of income.

But the costs of the life-tenant's application for payment of dividends of a fund in Court under the Act, seem to be payable out of income, by analogy to the practice under the Trustee Relief Acts, which was settled by the decisions in *Re Marner*, 3 Eq. 432, and *Re Evans*, 7 Ch. 609 (overruling several earlier cases).

The trustees' costs of appearance on the application, if allowed at all (see *Re Battell*, 21 W. R. 138), seem also to be payable out of income: see *Re Evans*, 7 Ch. 609.

Life-tenant's proceedings.

Application for his sole benefit.

Costs of proceedings by a life-tenant in respect of his life interest under the settlement, if for his sole benefit, cannot in general be charged against capital: *Croggan* v. *Allen*, 22 Ch. D. 101.

The life-tenant has accordingly been held liable for:—

(1) Costs of originating summons to be let into possession of the settled estates: *Re Bagot*, (1894) 1 Ch. 177; including the costs of the remainderman, if served: *Re*

Hunt, (1900) W. N. 65; although in *Re Newen*, (1894) 2 Ch. 297, the remainderman who appeared without having been served, was made to pay his own costs.

Life-tenant's proceedings.

(2) Costs of application for change of investments in order to increase income: *Equitable Assce. Co.* v. *Fuller*, 30 L. J. Ch. 497; *Re Tennant*, 60 L. T. 488; *Ex p. Tufnell*, 14 Ir. Jur. 95.

(3) Costs of administration suit, so far as caused by questions between the life-tenant and the trustees as to the income account: *Horn* v. *Coleman*, 26 L. J. Ch. 544; *Croggan* v. *Allen*, 22 Ch. D. 101.

(4) Costs of petition in an administration suit for payment of income: *Eady* v. *Watson*, 33 Beav. 481; see *Pratt* v. *Jenner*, 14 W. R. 852. The cases of *Scrivener* v. *Smith*, 8 Eq. 310, and *Longuet* v. *Hockley*, 22 L. T. 198 (where such costs were allowed out of capital) seem to be, in effect, overruled by *Re Evans*, 7 Ch. 609.

(5) Costs of reference to determine whether the life-tenant was capable of managing her own affairs (her right to income being dependent thereon): *Winthrop* v. *Winthrop*, 15 L. J. Ch. 403.

(6) Costs of action to establish the life-tenant's right to a charge on the estate for the amount of a mortgage paid off out of income, where the proceedings were rendered necessary by his having taken a reconveyance without expressly keeping the charge alive: *Gifford* v. *Fitzharding*, (1899) 2 Ch. 32.

Applications determining remainderman's rights.

If the life-tenant's application is also the means of determining the remainderman's rights, the costs are generally allowed out of capital.

Examples:—

(1) Costs of proceedings to enforce the life-tenant's right to investment in leaseholds in accordance with the provisions of the settlement: *Beauclerk* v. *Ashburnham*, 8 Beav. 322.

(2) Costs of application to determine the life-tenant's

Chap. VII.

rights in the proceeds of leaseholds sold under the powers of the Settled Estates Act, 1877: *Re Walsh*, 7 L. R. Ir. 554.

(3) Costs of application under the Settled Land Acts for determining the right of a life-tenant of an incumbered estate to exercise the powers of the Act: *Re Jones*, 26 Ch. D. 736.

(4) Costs of special case for determining the right of the life-tenant's executors to apportionment of dividends accruing at his death: *Lawrence* v. *Lawrence*, 26 Ch. D. 795.

(5) Costs of action for determining how the costs of proceedings taken by the trustees for the protection of the estate are to be borne: *Stott* v. *Milne*, 25 Ch. D. 710.

Apportionment.

But where the only question is as to the proportions in which the life-tenant and remainderman ought to contribute to a fund which has to be raised, or to share a fund which has to be divided, the costs are apportioned rateably between capital and income.

Examples:—

(1) Costs of proceedings for deciding how a renewal fund should be raised and borne: *Reeves* v. *Creswick*, 3 Y. & C. 715.

(2) Costs of proceedings for apportionment of a reversionary interest on its falling in: *Wilkinson* v. *Duncan*, 23 Beav. 469; *Re Chesterfield*, 24 Ch. D. at p. 654.

Redemption suit.

The costs of a life-tenant's suit to redeem mortgages on the settled estate, are payable out of capital: *Pawley* v. *Colyer*, 3 D. J. & S. 676; and so are his costs of settling a foreclosure action brought by the mortgagees: *More* v. *More*, 37 W. R. 414; and also his costs of suit against the remainderman to enforce his charge, in respect of incumbrances paid off by him: *Selby* v. *Selby*, 2 Jur. 106; *More* v. *More*, 37 W. R. 414; and his costs of a summons to enforce his charge in respect of

Proceedings to enforce charge.

paving expenses discharged by him: *Re Pizzi*, (1907) 1 Ch. 67.

Proceedings for protection of estate.

Costs of proceedings properly taken by trustees for the protection of the estate, either by action (*Stott* v. *Milne*, 25 Ch. D. 710), or by way of parliamentary opposition (*Re Ormrod*, (1892) 2 Ch. 318), are payable out of capital: see *Re Blake*, 72 L. T. 280.

A provision in the settlement for payment of the trustees' costs out of income was held not to apply to their costs of an unsuccessful action for permissive waste, brought by them against the life-tenant at the instance of the remainderman, but such costs were ordered to come out of capital: *Powys* v. *Blagrave*, 4 D. M. & G. 448.

Life-tenant's proceedings for protection of estate.

Costs incurred by a life-tenant in proceedings taken by him for the protection of the settled estate have been allowed by the Court out of capital under its ordinary jurisdiction: *Re De la Warr*, 16 Ch. D. 587; and were also allowed out of capital under the powers of the Settled Estates Act, 1877 (40 & 41 Vict. c. 18, s. 17, repealed by 45 & 46 Vict. c. 38): see *Re De la Warr*, 46 L. T. 340; *Re Twyford Abbey*, 30 W. R. 268.

But the Court refused to allow out of capital the costs of a proposed application to Parliament for authority to sell: *Stanford* v. *Roberts*, 52 L. J. Ch. 50.

Settled Land Act, 1882, s. 36.

Now, however, the Court is expressly empowered to direct that any costs, charges, or expenses incurred, or to be incurred in relation to any action, defence, petition to Parliament, parliamentary opposition or other proceeding, taken or proposed to be taken for protection of settled land, be paid out of property subject to the settlement: 45 & 46 Vict. c. 38, s. 36 (replacing 40 & 41 Vict. c. 18, s. 17): see *Re Ormrod*, (1892) 2 Ch. at p. 326.

The costs of a life-tenant's successful proceedings in Parliament to establish his title to an earldom, with

Chap. VII.

which the settled estates devolved, have been allowed out of capital under this section: *Re Aylesford*, 32 Ch. D. 162.

Enfranchisement under Copyhold Act.

Where the lord of a manor, being only life-tenant, charges the manor with expenses incurred by him in purchasing or enfranchising a copyhold interest under the Copyhold Act, 1894 (57 & 58 Vict. c. 46, ss. 36, 37), it is conceived that he is only bound to keep down the interest on the charge, as in the case of other incumbrances: see *post*, p. 106.

So, where the life-tenant of copyholds charges the land with the expenses of enfranchisement incurred by him under the Copyhold Act, 1894 (57 & 58 Vict. c. 46, s. 36), it is apprehended that he is under no greater liability.

Inclosure expenses.

Inclosure expenses raised by mortgage or sale under the powers of the Inclosure Act, 1845 (8 & 9 Vict. c. 118, ss. 133, 134), have also, it is conceived, to be borne by capital (see s. 137); the life-tenant, in the case of a mortgage, being bound to keep down the interest (s. 133).

The life-tenant seems to be entitled to be recouped out of capital all inclosure expenses properly paid by him under the Act, although he dies without having charged them on the inheritance in the manner prescribed by the Act: see *Vernon* v. *Manvers*, 31 Beav. 617.

Costs under Lands Clauses Act.

The life-tenant's costs properly incurred in relation to a sale of the estate under the Lands Clauses Act, 1845, may be allowed by the Court out of capital under the 73rd section: *Re Strathmore*, 18 Eq. 338; including costs of arbitration by sect. 34 thrown on the life-tenant by reason of his having claimed too much: *Re Aubrey*, 1 W. R. 464; *Re Berkeley*, 10 Ch. 56; and costs of negotiation: *Re Oldham*, W. N. 1871, 190; but not his

costs of opposing the promoters' bill in Parliament: *Re Berkeley*, 10 Ch. 56.

The costs of trustees or remaindermen served by a life-tenant for his own purposes with a petition for interim investment, are payable out of income: *Re Dowling*, 24 W. R. 729; but where necessarily served with a petition for reinvestment, owing to the existence of an administration suit, or the provisions of a private Act, their costs of appearance have been allowed out of capital: *Wilson* v. *Foster*, 28 L. J. Ch. 410; *Re Bowes*, 10 L. T. 598.

Where a petition for payment out has to be served on the Official Solicitor by reason of the life-tenant's neglect, the costs of such solicitor are payable out of income: *Re Clarke*, 21 Ch. D. 776.

Costs under S. E. Acts.

The costs of a life-tenant's petition under the Settled Estates Acts, 1856, for power to lease, were allowed out of capital: *Re Dorning*, 14 W. R. 125; *Wheeler* v. *Tootel*, 16 W. R. 273; see *Lovat* v. *Leeds*, 11 L. T. 442; and the Court has the same power of allowing costs out of capital under the Settled Estates Act, 1877 (40 & 41 Vict. c. 18, s. 41, re-enacting 19 & 20 Vict. c. 120, s. 29).

Costs under S. L. Acts.

Capital money arising under the Settled Land Act, 1882, may be applied in payment of costs, charges and expenses of or incidental to the exercise of any of the powers or the execution of any of the provisions of the Act (45 & 46 Vict. c. 38, s. 21 (x)).

The section seems only to authorize the payment out of capital money of costs properly chargeable against capital: and the Court has refused to allow the application of capital in payment of costs properly chargeable against income, such as the costs of an unnecessary survey and valuation ordered by the life-tenant: *Re Eyton*, W. N. 1888, 254; or the costs of obtaining the

Chap. VII.

concurrence of the life-tenant's incumbrancers: *Cardigan* v. *Curzon-Howe*, 41 Ch. D. 375; although in one case such costs were allowed out of capital: see *Re Beck*, 24 Ch. D. 608.

But the following costs have been allowed out of capital money:—

(1) The ordinary costs of a sale under the Act, including, in the case of several persons together constituting the tenant for life, the extra costs occasioned by their employing separate solicitors to peruse and complete the conveyance: *Smith* v. *Lancaster*, (1894) 3 Ch. 439.

(2) The costs properly incurred of an abortive sale: *Re Smith*, (1891) 3 Ch. 65; see *Re Beck*, 24 Ch. D. 608.

(3) The costs and fees of the life-tenant's solicitor and surveyor in preparing and carrying out a proper scheme for improvements: *Re Stamford*, 43 Ch. D. 84.

(4) The costs of an application for appointing trustees for the purposes of the Act: *Williams* v. *Jenkins*, (1894) W. N. 176.

(5) The life-tenant's costs of defending an unsuccessful action brought to restrain him from exercising his statutory power of sale (beyond the party and party costs received by him): *Re Llewellin*, 37 Ch. D. 317.

(6) The charges of an estate agent for letting on a building lease for a long term: *Re Maryon-Wilson*, (1901) 1 Ch. 934; but not his charges for letting for a short term: *Re Leveson Gower*, (1905) 2 Ch 95.

Raising costs.

When a life-tenant is declared entitled to his costs out of the trust property, and the funds in hand are not sufficient, he has a right to have the deficiency raised by an immediate sale or mortgage: *Burkett* v. *Spray*, 1 Russ. & M. 113; *Re McClure*, 76 L. J. Ch. 52.

Costs of raising money for discharging incumbrances under sect. 11 of the Settled Land Act, 1890, may be raised in the same way: 53 & 54 Vict. c. 69, s. 11;

even where the principal has not been called in and the only object is to reduce the rate of interest: *Re Clifford*, (1902) 1 Ch. 87.

Costs out of wrong fund.

An order for payment of costs out of a fund does not necessarily determine the ultimate liability of the fund to bear them; and where costs properly payable out of capital have been ordered to be paid out of a fund representing income, the rights of the parties may be adjusted without an appeal: *Sheppard* v. *Sheppard*, 33 Beav. 129.

CHAPTER VIII.

INCUMBRANCES.

The old rule charging life-tenants of incumbered estates with part of the principal of the incumbrances, has long been obsolete: see *Penrhyn* v. *Hughes*, 5 Ves. at p. 107; *Kekewich* v. *Marker*, 3 Mac. & G. at p. 328:

Present rule.

the modern rule being that, in the absence of any provision to the contrary in the settlement, the life-tenant is liable, as between himself and the remainderman, to keep down, out of the rents and profits of the estate, the interest accruing during his lifetime, on all incumbrances affecting the inheritance, but not to discharge any part of the principal: *Revel* v. *Watkinson*, 1 Ves. Sen. 93; *Peterborough* v. *Mordaunt*, 1 Eden, 474; *Kinnoul* v. *Money*, 3 Sw. 202 n.; *Penrhyn* v. *Hughes*, 5 Ves. 99; *Raffety* v. *King*, 1 Keen, 601; *Burges* v. *Mawbey*, T. & R. 167; *Dixon* v. *Peacock*, 3 Dr. 288.

Wasting security.

In one case, however, where freeholds and leaseholds were settled subject to a trust to raise a sum of money, and it was not raised for nearly twenty-five years, during which time the life-tenant paid the interest and received the full rents of the leaseholds, the Court apportioned the charge between the freeholds and leaseholds according to their value at the testator's death, and charged the life-tenant with a proportionate part of the principal sum allocated to the leaseholds, on account of their wasting nature and his enjoyment in specie: *Blake* v. *O'Reilly*, (1895) 1 I. R. 479.

Extent of rule.

The life-tenant is bound to give up, if necessary, all the rents during the whole of his life to liquidate all

arrears of interest accruing during his own time: see *Caulfield* v. *Maguire*, 2 Jo. & Lat. 141; and the life-tenant does not get rid of this liability by taking a transfer of the incumbrances: *Long* v. *Harris*, 24 L. T. O. S. 297.

The rule applies even where the incumbrances are created by the life-tenant himself under a power to charge (*Kensington* v. *Bouverie*, 7 H. L. C. 557), or under an absolute power of appointment: *Whitbread* v. *Smith*, 3 D. M. & G. 741.

Apportionment.

The life-tenant being liable to pay the interest on an incumbrance up to the day of his death, the interest then current is a 'just allowance' within 4 & 5 Will. IV. c. 22, s. 2, and 33 & 34 Vict. c. 35, s. 4, which has to be apportioned: see *Re Gore*, I. R. 9 Eq. 83; *Lindsay* v. *Wicklow*, I. R. 6 Eq. 72.

Charge by will.

The rule that the life-tenant must keep down interest on incumbrances so far as the rents extend, applies to a settlement by will of real estate subject to a charge of debts: *Faulkner* v. *Daniel*, 3 Ha. 199; *Wastell* v. *Leslie*, 13 L. J. Ch. 205; *Shore* v. *Shore*, 4 Dr. 501; and as well to interest during the first year from the testator's death as afterwards: *Barnes* v. *Bond*, 32 Beav. 653; *Marshall* v. *Crowther*, 2 Ch. D. 199 (not following *Greisley* v. *Chesterfield*, 13 Beav. 288); even where other property primarily liable does not become available for a considerable period: *Hawkins* v. *Hawkins*, 6 L. J. Ch. 69; see *Shore* v. *Shore*, 4 Dr. 501.

Failure to keep down interest.

The liability of the life-tenant is not a mere personal obligation, but a charge on his life estate: see *Waring* v. *Coventry*, 2 My. & K. at p. 408; *Kirwan* v. *Kennedy*, I. R. 3 Eq. at p. 481; and if the life-tenant fails to keep down the interest on a charge, his subsequent income is liable to recoup the remainderman the additional

Chap. VIII.

amount which has to be raised in consequence: *Waring* v. *Coventry*, 2 My. & K. 406; *Makings* v. *Makings*, 1 D. F. & J. 355; *Fitzmaurice* v. *Murphy*, 8 Ir. Ch. Rep. 363; *Kilworth* v. *Mountcashell*, 12 Ir. Ch. Rep. 43; 15 Ir. Ch. Rep. 565; and in such a case the remainderman seems entitled to a receiver: see *Kensington* v. *Bouverie*, 7 H. L. C. at p. 575; *Hill* v. *Browne*, Dru. at p. 434; *Coote* v. *O'Reilly*, 1 Jo. & Lat. at p. 461; *Kirwan* v. *Kennedy*, I. R. 3 Eq. at p. 481.

At the life-tenant's death the remainderman may recover any arrears of interest incurred at any time during the life-tenancy, as a debt against the life-tenant's estate, as the statutes of limitations do not run during the life-tenancy: *Kirwan* v. *Kennedy*, I. R. 3 Eq. 472; *Baldwin* v. *Baldwin*, 6 Ir. Ch. Rep. 156. Arrears of interest existing at the life-tenant's death may also be set off against any charge which the life-tenant had on the inheritance: *Re Whyte*, 7 Ir. Ch. Rep. 61; see *Howlin* v. *Sheppard*, I. R. 6 Eq. 497. It has been doubted, however, whether rents in arrear at the life-tenant's death can be impounded to answer arrears of interest: cf. *Dillon* v. *Dillon*, 4 Ir. Ch. Rep. 102 (where the claim was by the next life-tenant), and *Re Fitzgerald*, I. R. 1 Eq. 453.

Insufficient income.

If the rents are insufficient to keep down the interest, the life-tenant is entitled to have the incumbrance raised by sale: *Penrhyn* v. *Hughes*, 5 Ves. at p. 107; *Cooke* v. *Cholmondeley*, 4 Dr. 244; but see *Kinnoul* v. *Money*, 3 Sw. at p. 208 n.

Maintenance.

In some cases where the estate has been settled as a provision for the settlor's family, the Court has allowed the life-tenant (being a child) maintenance out of the income, although insufficient for keeping down the interest: *Revel* v. *Watkinson*, 1 Ves. Sen. 93; see *Burges* v. *Mawbey*, T. & R. at p. 174.

Personal liability.

The life-tenant incurs no personal liability for the

excess of interest above the rents: see *Honywood* v. *Honywood*, (1902) 1 Ch. at p. 351; but if he regularly pays the interest during his life, without giving the remainderman notice of the insufficiency of the rents, or of his intention to claim a charge on the estate for the excess, he is not entitled to such a charge: *Kensington* v. *Bouverie*, 7 H. L. C. 557; see *Dixon* v. *Peacock*, 3 Dr. 288.

Where the income is only temporarily insufficient to keep down the interest on a mortgage, the arrears are payable out of subsequent income accruing during the same life-tenancy: *Revel* v. *Watkinson*, 1 Ves. Sen. 93; *Tracy* v. *Hereford*, 2 Bro. C. C. 128; and if the arrears are raised by sale of part of the property, the income of the part remaining unsold is liable to recoup capital the amount raised: see *Honywood* v. *Honywood*, (1902) 1 Ch. at p. 351.

Successive life-tenants.

It was at one time thought that the above-cited case of *Tracy* v. *Hereford*, decided that arrears of interest left unpaid by a prior life-tenant were payable out of income during a subsequent life-tenancy: see *Penrhyn* v. *Hughes*, 5 Ves. at p. 107; but Lord St. Leonards took the contrary view in *Caulfield* v. *Maguire*, 2 Jo. & Lat. 141; and it seems to be now settled that a life-tenant's obligation to keep down interest only extends to interest accruing during his own life-tenancy, and that any arrears of interest remaining at the death of a life-tenant become a charge on the inheritance, and not on the income of a subsequent life-tenant: *Sharshaw* v. *Gibbs*, Kay, 333; see *Revel* v. *Watkinson*, 1 Ves. Sen. at p. 94; *Kennedy* v. *Daly*, 7 Ir. Ch. Rep. 445.

Accordingly, if the life-tenant is compelled to pay arrears of interest which accrued during a prior life-tenancy, he is entitled to be recouped out of capital: *Kirwan* v. *Kennedy*, I. R. 4 Eq. 499.

So, any arrears of interest due at the date of the

Chap. VIII.

Interest due at date of settlement.

settlement of an incumbered estate are a charge on the inheritance, for which the life-tenant is not liable: *Kennedy* v. *Daly*, 7 Ir. Ch. Rep. 445; *Kilworth* v. *Mountcashell*, 12 Ir. Ch. Rep. 43.

Mortgagee in possession.

Where a mortgagee of the settled estate enters and receives rents in excess of the interest payable, the life-tenant is entitled to a charge on the inheritance for the excess: *Faulkener* v. *Daniel*, 10 L. J. Ch. 33; *Pawley* v. *Colyer*, 3 D. J. & S. 676; subject, however, to a set-off of any interest on other incumbrances allowed by him to fall into arrear: *Scholefield* v. *Lockwood*, 12 W. R. 114.

Several estates.

Where several estates are settled together by the same settlement, the income of each is liable to be applied in keeping down the interest on the incumbrances affecting the others: *Tracy* v. *Hereford*, 2 Bro. C. C. 128; *Frewen* v. *Law Life Assce. Soc.*, (1896) 2 Ch. 511; *Honywood* v. *Honywood*, (1902) 1 Ch. 347; see *Re Hotchkys*, 32 Ch. D. 408; and it makes no difference that one of the estates is settled by way of trust for sale: *Bond* v. *Biggs*, 6 L. T. 794. If arrears of interest are raised by sale of one of the estates, subsequent income of the other estate accruing during the same life-tenancy is applicable to recoup capital the amount raised: *Honywood* v. *Honywood*, (1902) 1 Ch. 347.

But the life-tenant incurs no personal liability by reason of his enjoyment of any property not producing income: *Syer* v. *Gladstone*, 30 Ch. D. 614.

Charge of legacies.

Where an estate is settled subject to a charge of legacies, any interest payable on the legacies is payable out of income: *Milltown* v. *Trench*, 4 Cl. & F. 276; *Coote* v. *Milltown*, 1 Jo. & Lat. 501; *Faulkner* v. *Daniel*, 3 Ha. 199; *Makings* v. *Makings*, 1 D. F. & J. 355.

Charge of annuities.

Where an estate is settled, charged *simpliciter* with a life annuity, the life-tenant must keep down the

instalments out of income, and is not entitled to have a government annuity purchased out of capital to satisfy it: see *Re Grant*, 52 L. J. Ch. at p. 553, and if the arrears are raised by sale of part of the settled estate, the remainderman is entitled to be recouped the amount raised out of the produce of the life-estate: *Coote* v. *O'Reilly*, 1 Jo. & Lat. 455. But if the income is insufficient, so that there are arrears at the annuitant's death, the life-tenant is only bound to keep down the interest on the arrears, as they are a charge on capital: *Prince* v. *Cooper*, 17 Beav. 187.

Where, however, real estate is settled by will charged with life annuities which the testator was personally liable to pay, the annuities, being in effect debts (whether redeemable or not), must be capitalized, and the capitalized value treated as a charge on the inheritance: *Re Muffett*, 39 Ch. D. 534; the life-tenant being only bound to keep down the interest on the capitalized value: *Bulwer* v. *Astley*, 1 Ph. 422; *Re Harrison*, 43 Ch. D. 55 (not following *Yates* v. *Yates*, 28 Beav. 637, where—the property being unproductive—the annuities were held to be apportionable between the life estate and the reversion according to their value).

Accordingly, if the life-tenant pays any instalments of the annuities, he is entitled to a charge for the amount: *Re Harrison*, 43 Ch. D. 55; and see *post*, p. 133.

Legacy duty.

Legacy duty payable in respect of a settled legacy or settled residue is payable out of capital, if the life-tenant and remainderman are chargeable at the same rate; but if chargeable at different rates, the duty on the life-interest is payable by the life-tenant, and the duty on the remainder by the remainderman: see 36 Geo. III. c. 52, ss. 12, 13; *Bowra* v. *Rhodes*, 10 W. R. 747.

Succession duty.

The succession duty payable on the succession of a life-tenant to real property, is a charge on his interest

Chap. VIII.

only (see 16 & 17 Vict. c. 51, ss. 21, 42), and accordingly has to be borne by him (see *ante*, p. 96); unless the life-tenant is competent to dispose of the property, in which case, the duty is made a charge on the inheritance: 57 & 58 Vict. c. 30, s. 18.

In the case of personal property comprised in a succession, the 12th section of 36 Geo. III. c. 52 applies, as if the property were a legacy (16 & 17 Vict. c. 51, s. 32): so that where the life-tenant and remainderman are chargeable at the same rate, the duty is a charge on capital: *A.-G.* v. *Aberdare*, (1892) 2 Q. B. 684; and in such a case if the duty is paid by the life-tenant, he is entitled to be recouped out of capital: *Cuddon* v. *Cuddon*, 4 Ch. D. 583.

Estate duty.

Estate duty under the Finance Act, 1894, is payable out of capital, and if paid by the life-tenant, he is entitled to a charge for the amount: see 57 & 58 Vict. c. 30, s. 9; *Re Dixon*, (1902) 1 Ch. at p. 250. If raised by sale, the life-tenant simply loses the income of the property sold; but if raised by mortgage, he must keep down the interest: *Re Parker-Jervis*, (1898) 2 Ch. 643.

Settlement estate duty is also payable out of capital: see 57 & 58 Vict. c. 30, s. 5; 59 & 60 Vict. c. 28, s. 19.

Interest payable on death duties, when payment is postponed under sect. 18 of the Finance Act, 1896 (59 & 60 Vict. c. 28), stands on the same footing as interest on other charges, and is payable by the life-tenant; and he cannot raise it under sect. 9 of the Finance Act, 1894, as it is not 'properly incurred' by him: *Re Howe*, (1903) 2 Ch. 69.

Special provisions.

In order that the liability of a life-tenant in respect of incumbrances may be increased by any provision in the settlement, the intention must be clearly expressed.

Trust to raise by mortgage.

Thus, a direction to raise a charge by mortgage, does not alter the rights of the parties; the life-tenant being

only bound to keep down interest on the amount raised: *Wastell* v. *Leslie*, 13 L. J. Ch. 205; and a trust to raise portions by selling timber or by demising, mortgaging, or selling or any other reasonable ways or means, has no greater effect: *Marker* v. *Kekewich*, 8 Ha. 291.

Trust to raise out of rents.

A direction to raise sums out of the rents and profits of real estate does not necessarily throw the whole charge upon income: the intention is to be collected from the context and from the purposes for which the money is to be raised: *Wilson* v. *Halliley*, 1 Russ. & M. 590; and where those purposes require immediate payment of the money, as in the case of debts, the presumption is that it is to be raised by sale or mortgage of the inheritance, and not by accumulating income: *Ib.*

Thus, a trust to raise debts out of rents and profits, without more, does not throw the burden upon income, but charges the inheritance: *Fitzherbert* v. *Weld*, 24 W. R. 43; *Metcalfe* v. *Hutchinson*, 1 Ch. D. 591; and a direction to raise legacies out of the rents and profits stands on the same footing: see *Londesborough* v. *Somerville*, 19 Beav. 295.

A trust to raise debts out of the rents and profits by leasing, mortgage or sale, has the same effect, the life-tenant being liable only to keep down the interest on the amount raised: *Revel* v. *Watkinson*, 1 Ves. Sen. 93.

But a trust to raise portions out of rents and profits by leasing, has been held to charge income only, and not capital: *Ivy* v. *Gilbert*, 2 P. Wms. 13; 6 Bro. P. C. 68; and where the life estate was subject to a discretionary trust to raise charges by and out of the rents, issues and profits or by any other ways and means except a sale, it was held that the charges could not be raised by sale or mortgage, but only out of the rents and the profits of timber and mines, so as not to exhaust the whole inheritance: *Bennett* v. *Wyndham*, 23 Beav. 521; 4 D. F. & J. 259.

A direction to raise legacies out of the annual rents

Chap. VIII.

and profits, has been held to charge them on income alone: *Marsh* v. *Marsh*, 2 Jur. N. S. 348; and a direction to pay debts out of the rents, dividends, and annual proceeds, has been held to have the same effect: *Re Green*, 40 Ch. D. 610.

So, where there was a trust to raise debts out of the rents, and subject thereto, the residue of the rents was given to the life-tenant, the debts were held to be a charge on income and not on capital: *Heneage* v. *Andover*, 3 Y. & J. 360; and see *Wilson* v. *Halliley*, 1 Russ. & M. 590 (where there was also a limited power of mortgaging).

Direction for life-tenant to pay.

A declaration that the life-tenant shall be bound to pay an incumbrance, charges the income with principal as well as interest: see *Waddell* v. *Waddell*, 6 Dow. 279.

So does a direction that mortgages shall remain charged until discharged by the life-tenant: *Milnes* v. *Slater*, 8 Ves. 295.

But where the rents of an estate settled by will are directed to be applied in paying the testator's debts until all are discharged, the direction comes to an end when the debts are paid, even though such payment be made out of capital: *Tewart* v. *Lawson*, 18 Eq. 490; *Norton* v. *Johnstone*, 30 Ch. D. 649; and the life-tenant is not liable to recoup the capital out of income in the absence of a direction for that purpose: *Re Green*, 40 Ch. D. 610; *Re Richardson*, (1900) 2 Ch. 778; *Re Heathcote*, (1904) 1 Ch. 826; and see *ante*, p. 19.

Trustees' discretion.

Where trustees are given a discretion as to the mode of raising a charge, the exercise of their discretion does not in general determine the manner in which the charge is to be borne as between the life-tenant and remainderman: *Marker* v. *Kekewich*, 8 Ha. 291; *Blake* v. *O'Reilly*, (1895) 1 I. R. 479; see *Bennett* v. *Wyndham*, 23 Beav. 521; and it seems to be their duty to raise it

in such a way as to charge the principal on the inheritance, and to secure the application of the annual profits in keeping down the interest: see *Kekewich* v. *Marker*, 3 Mac. & G. at p. 328.

S. L. Act, 1882, s. 21.

The right of the life-tenant under sections 21 and 22 of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), to have capital money arising under the Act applied in discharge, purchase or redemption of incumbrances affecting the settled estate, does not in general interfere with the rights of the remainderman; the incumbrance being extinguished, and the life-tenant merely losing the interest of the capital money so applied, instead of paying the interest on the incumbrance: see *Re Knatchbull*, 29 Ch. D. at p. 592; *Re Frewen*, 38 Ch. D. 383; *Re Esdaile*, 54 L. T. 637; but the Act overrides any directions in the settlement for payment of incumbrances out of income: see *Re Richardson*, (1900) 2 Ch. 778; *Re Heathcote*, (1904) 1 Ch. 826.

Tenant right.

Compensation payable to an outgoing tenant of settled land for his tenant-right under a farming lease, has to be borne by the life-tenant if in receipt of the rents, but it seems that he may recoup himself by reletting the property and making the incoming tenant pay: *Mansel* v. *Norton*, 22 Ch. D. 769; see, however, *Re Rosher*, (1899) W. N. 134.

So, compensation paid by a life-tenant on resuming possession of a holding under the Land Law (Ireland) Act, 1881, for the purpose of occupying it as a residence, has to be borne by him: see *Martin* v. *Martin*, (1898) 1 I. R. 112.

Agricultural Holdings Acts.

A life-tenant who paid compensation to an outgoing tenant for improvements under the Agricultural Holdings (England) Acts, 1883 to 1900, or expended money under those Acts in executing a drainage improvement,

Chap. VIII.

was entitled to obtain from the Board of Agriculture (substituted for the County Court by 63 & 64 Vict. c. 50, s. 3) a charge on the holding for the amount so paid or expended, repayable by instalments: 46 & 47 Vict. c. 61, ss. 29, 30; 63 & 64 Vict. c. 50, ss. 1, 3 (repealed by 8 Ed. VII. c. 28, s. 49); see *Gough* v. *Gough*, (1891) 2 Q. B. 665; and a charge created under those Acts in respect of any improvement mentioned in the first or second part of the First Schedule to the Act of 1900 (see *ante*, p. 79), may be discharged out of capital money arising under the Settled Land Acts, 1882 to 1890, as if the charge were an incumbrance authorized by those Acts to be discharged out of that capital money: 8 Ed. VII. c. 28, s. 20 (re-enacting 46 & 47 Vict. c. 61 s. 29, as altered by 63 & 64 Vict. c. 50, ss. 1, 3).

Agricultural Holdings Act, 1908.

A life-tenant who pays compensation to an outgoing tenant for improvements under the Agricultural Holdings Act, 1908, or expends money under the Act in executing a drainage improvement, is entitled to obtain from the Board of Agriculture and Fisheries an order charging the holding with repayment of the amount so paid or expended, by instalments: 8 Ed. VII. c. 28, s. 15; and see s. 42; and a charge created under the Act in respect of any improvement mentioned in the first or second part of the First Schedule thereto (see *ante*, p. 79) may be discharged out of capital money arising under the Settled Land Acts, 1882 to 1890, as if the charge were an incumbrance authorized by those Acts to be discharged out of that capital money: 8 Ed. VII. c. 28, s. 20.

Terminable rentcharges under Improvement Acts.

By the Land Drainage Act, 1845, the Public Money Drainage Act, 1846, and the Improvement of Land Act, 1864, a life-tenant is made liable to pay the instalments, which become payable during the continuance of his interest, of terminable rentcharges created in respect of improvements under those Acts: 8 & 9 Vict. c. 56, s. 10;

9 & 10 Vict. c. 101, s. 38; 27 & 28 Vict. c. 114, s. 66; and, although the instalments are made a charge on the inheritance, this liability was held not to be affected by the Settled Land Act, 1882: *Re Knatchbull*, 29 Ch. D. 588.

S. L. Act, 1887.

But now, where a rentcharge, whether temporary or perpetual, has been created in pursuance of any Act of Parliament, with the object of paying off any moneys advanced for defraying the expenses of an improvement of a kind authorized by the Settled Land Act, 1882, any capital money expended in redeeming such rentcharge, or otherwise providing for its payment, is to be deemed to be applied in payment for an improvement authorized by the Act of 1882: 50 & 51 Vict. c. 30, s. 1.

Accordingly, trustees may apply capital money in redeeming such a terminable rentcharge, and paying (if necessary) a reasonable and proper bonus as compensation for the lender's loss of interest: *Re Egmont*, 45 Ch. D. 395 (in effect overruling *Re Sudeley*, 37 Ch. D. 123, so far as that case decided that the part of the instalments representing interest could not be paid out of capital): and see *Re Navan & Kingscourt R. Co.*, 21 L. R. Ir. 369.

The Act of 1887 applies as to instalments falling due since, although the improvement was made before, it came into operation (s. 1); and although the improved land may have been sold and the rentcharge shifted on to other parts of the settled estate: *Re Howard*, (1892) 2 Ch. 233. But the Act does not entitle the life-tenant to be recouped instalments paid by him before the 23rd August, 1887, when it came into operation (*Re Howard*, (1892) 2 Ch. 233), nor instalments paid by him before requiring provision to be made for them under the Act (notwithstanding sect. 15 of the Act of 1890): *Re Dalison*, (1892) 3 Ch. 522; *Re Bristol*, (1893) 3 Ch. 161; nor a sum already paid by him to obtain a reduction of interest: *Re Verney*, (1898) 1 Ch. 508.

If a life-tenant redeems other terminable charges

Chap. VIII.

which are not within the Act of 1887, he is not entitled to be recouped in full out of capital, but only to be placed in the same position as before he redeemed: see *Re Leinster*, 23 L. R. Ir. 152 (where a terminable tithe rentcharge was redeemed); and see *Ex p. Studdert*, 6 Ir. Ch. Rep. 53 (a case before the Act).

S. L. Act, 1890.

Where money required for discharging an incumbrance is raised by the life-tenant by mortgage of the settled land under the powers of the Settled Land Act, 1890 (53 & 54 Vict. c. 69, s. 11), it is conceived that he is liable to keep down the interest on the mortgage.

Payment of charge by life-tenant.

If the life-tenant pays off a charge on the settled estate, he is presumed to have done so for his own benefit, and is entitled to be recouped the amount paid by him out of the estate, in the absence of any circumstances showing a contrary intention: *Shrewsbury* v. *Shrewsbury*, 1 Ves. Jun. 227; *Burrell* v. *Egremont*, 7 Beav. 205; *Faulkner* v. *Daniel*, 3 Ha. 199; *Pitt* v. *Pitt*, 22 Beav. 294 (where the charge was transferred to a trustee for the life-tenant): see *Morley* v. *Morley*, 5 D. M. & G. 610; *Redington* v. *Redington*, 1 B. & Be. 131; *Hill* v. *Browne*, Dru. 426; *Lysaght* v. *Lysaght*, 4 Ir. Jur. 110; *Howlin* v. *Sheppard*, I. R. 6 Eq. 497; *Lindsay* v. *Wicklow*, I. R. 7 Eq. 192.

And the same presumption applies where a charge is paid off by the trustees of the settlement out of the rents: *Re Harvey*, (1896) 1 Ch. 137; but not where mere bond debts of a testator are paid off by the life-tenant under his will: *Morley* v. *Morley*, 5 D. M. & G. 610.

In the above cases the payment was made voluntarily, but the presumption also applies in the case of a statutory charge for paving or sewering expenses, which the life-tenant, as between himself and the Local Authority, is liable to pay: *Re Smith*, (1901) 1 Ch. 689; *Re Pizzi*,

(1907) 1 Ch. 67; and where the presumption applies, the life-tenant is entitled to have the charge raised under sect. 11 of the Settled Land Act, 1890: *Ib.*

The presumption applies equally in the case of a charge paid off by instalments consisting of principal and interest, as in the case of a building society's mortgage; the life-tenant being liable to bear only the part representing interest: *Re Harvey*, (1896) 1 Ch. 137.

Successive life-tenants paying off a mortgage by instalments, are entitled to be recouped rateably, and not according to priority: *Re Nepean*, (1900) 1 I. R. 298.

Question of intention.

The question, however, is always one of intention: the rule only providing that in the absence of evidence the life-tenant's intention is to be gathered from what it would be his interest to do: see *Pitt* v. *Pitt*, 22 Beav. 294.

Hence, the presumption that the payment was made for the life-tenant's benefit may be rebutted by evidence of a contrary intention: the smallest demonstration that he meant to discharge the estate being sufficient: see *Jones* v. *Morgan*, 1 Bro. C. C. at p. 218; *Kensington* v. *Bouverie*, 7 H. L. C. at pp. 574, 595; and (*semble*) if the life-tenant when he makes the payment intends to discharge the inheritance, he cannot afterwards revive the charge: see *Morley* v. *Morley*, 5 D. M. & G. at p. 626; *Re Godley*, (1896) 1 I. R. at p. 52.

But the burden of proving an intention to merge the charge, lies on the remainderman: *Re Harvey*, (1896) 1 Ch. 137.

The mere fact of the charge being released without the life-tenant expressing an intention to keep it alive is not sufficient to rebut the presumption: *Burrell* v. *Egremont*, 7 Beav. 205; *Gifford* v. *Fitzhardinge*, (1899) 2 Ch. 32.

The fact of the life-tenant having had some intention

Chap. VIII.

of bearing the charge if he should afterwards find it convenient so to do, was held not to rebut the presumption in *Cuddon* v. *Cuddon*, 4 Ch. D. 583; and see *Lindsay* v. *Wicklow*, I. R. 7 Eq. 192 (where an untrue recital of payment off, in a subsequent conveyance in which the life-tenant joined, was disregarded).

Evidence of intention.

If the question arises in the life-tenant's lifetime, his evidence is admissible to prove that he intended to keep the charge alive: see *Morley* v. *Morley*, 5 D. M. & G. 610; *Gifford* v. *Fitzhardinge*, (1899) 2 Ch. 32.

If the question arises on the life-tenant's death, his acts prior to his decease and the facts then affecting his position must be taken into consideration for the purpose of ascertaining his intention. Thus, an assignment to a trustee for the life-tenant would not keep the charge alive if his will showed an intention to merge it; *Re Lloyd*, (1903) 1 I. R. 144; but the mere fact of his being insolvent at his death would not override his declared intention to merge it: see *Re Godley*, (1896) 1 I. R. 45.

Mistake.

If a life-tenant pays off a charge and takes a release with the intention of extinguishing it, in the belief that he is owner in fee, he is entitled on discovering his mistake to revive the charge: *Conolly* v. *Barter*, (1904) 1 I. R. 130; and see *Burrell* v. *Egremont*, 7 Beav. at p. 232.

Life-tenant parent.

The presumption is not rebutted by the mere fact of the life-tenant being the mother of the remainderman: *Re Harvey*, (1896) 1 Ch. 137; although the fact of the life-tenant being the parent of the remainderman would be of importance if there were anything else to rebut the presumption: see *Re Harvey*, (1896) 1 Ch. at p. 140.

Life-tenant settlor.

The fact of the life-tenant being also the settlor does not disentitle him to be recouped money paid by him in discharging an incumbrance: *Jameson* v. *Stein*, 21

Beav. 5; see *Gifford* v. *Fitzhardinge*, (1899) 2 Ch. 32; *Redington* v. *Redington*, 1 B. & Be. 131; *Dolphin* v. *Aylward*, 15 Ir. Ch. Rep. 583.

Delay in claiming charge.

The charge may be claimed by the life-tenant's personal representatives, even where the payment has been made more than twelve years before the life-tenant's death, as the statute of limitations does not run during the life-tenancy: the life-tenant being deemed to have kept down the interest on the charge out of the rents received by him: *Burrell* v. *Egremont*, 7 Beav. 205; see *Baldwin* v. *Baldwin*, 4 Ir. Ch. Rep. 504.

Calls on shares.

Calls on settled shares are payable out of capital, unless a contrary intention is shown by the settlement: *Re Box*, 1 H. & M. 552; *Todd* v. *Moorhouse*, 19 Eq. 69; *Bevan* v. *Waterhouse*, 3 Ch. D. 752; and if paid by the life-tenant, he is entitled to a lien on the shares for the amount: *Rowley* v. *Unwin*, 2 K. & J. 138; which if not raised in his lifetime may be claimed by his personal representative: *Todd* v. *Moorhouse*, 19 Eq. 69.

But if a remainderman voluntarily pays a call to prevent forfeiture, he is not entitled to have it raised by sale: see *Parke* v. *Thackray*, 24 W. R. 21.

The life-tenant of shares settled by will, is liable, as between himself and the testator's estate, to pay any calls made on the shares during his life: see *Re Box*, 1 H. & M. at p. 555 (disapproving *Jacques* v. *Chambers*, 4 Railw. Cas. 499, and *Clive* v. *Clive*, Kay, 600).

Premiums on policies.

Where a policy of life assurance is settled, the premiums are payable out of capital, and if there is no fund available, must be raised by mortgage of the policy: *Macdonald* v. *Irvine*, 8 Ch. D. 101; and if the trustees pay the premiums out of income, the life-tenant is entitled to be recouped the amount with interest at

4 per cent.: *Re Morley*, (1895) 2 Ch. 738: see *Money* v. *Gibbs*, 1 Dru. & Wal. 394.

But a life-tenant has no lien for premiums voluntarily paid by him for the benefit of the estate, without any expectation of repayment: *Re Waugh*, 46 L. J. Ch. 629; *Browne* v. *Browne*, 2 Gif. 304.

CHAPTER IX.

LOSSES.

General principle.

The general principle on which the Court acts in determining the incidence of losses in respect of settled property is that neither the life-tenant nor the remainderman is to gain any advantage over the other: neither is to suffer more damage in proportion to his estate or interest than the other: see *Cox* v. *Cox*, 8 Eq. at p. 344; *Re Bird*, (1901) 1 Ch. at p. 919.

In applying this principle, however, certain distinctions—not altogether satisfactory—have been drawn between losses of income and losses of capital, and as to the former between investments securing interest at a fixed rate and other investments, and between authorized and unauthorized investments.

Loss of income.

Investments not securing fixed interest.

In the case of investments not securing interest at a fixed rate, there is in general no apportionment in respect of a loss of income, but the whole loss falls on the life-tenant: see *Shore* v. *Shore*, 4 Dr. at p. 509.

Unproductive land.

Thus, where unproductive building land is settled, the life-tenant is not entitled to any contribution from capital to make up for the loss of income; although it would seem to be otherwise if the settlement were by way of trust for sale and the sale were improperly delayed: *Yates* v. *Yates*, 28 Beav. 637; see *Re Searle*, (1900) 2 Ch. at p. 834; and see *ante*, p. 3.

Trustee's defalcations.

So, where a trustee applied the rents of a settled estate to his own use, instead of paying renewal fines pursuant to the trust, and became insolvent, the

Chap. IX.

life-tenant had to bear the loss: *Solley* v. *Wood*, 29 Beav. 482; and where income is lost through the misappropriation of settled stock, the loss falls on the life-tenant: *Re Grabowski*, 6 Eq. 12.

Reduced annuities.

The reduction of the rate of interest of Government stock gives the life-tenant no claim to have any part of the loss made up out of capital: see *Bague* v. *Dumergue*, 10 Ha. 462 (where the will contained a provision that if the investments should be paid off or reduced, the persons interested should bear the loss rateably out of their respective interests on becoming entitled thereto).

Bond securing interest earned.

And where the interest on a railway bond was only payable 'as and when earned,' the life-tenant was held to have no claim against capital for interest not earned: *Re Taylor*, (1905) 1 Ch. 734

Mistake of Court.

But apportionment has been allowed where a loss of income was occasioned by the mistake of the Court. Thus where settled residue, paid away under an erroneous order of the Court, was subsequently recovered without interest, it was held that the fund recovered must not be treated as capital only, but that such a proportion of the fund as was equivalent to interest at 3 per cent. on the balance, ought to be paid to the life-tenant as income: *Re Cleveland*, (1895) 2 Ch. 542.

Partnership.

Where a share in a partnership is settled, the liability of the life-tenant and remainderman for losses is regulated by the practice of the Firm in the absence of any provision in the settlement to the contrary; and where the practice has been to write off losses against capital, losses are chargeable against capital as between the life-tenant and remainderman: *Gow* v. *Forster*, 26 Ch. D. 672.

Business.

But where there is no partnership, losses incurred in carrying on a business must in general be made good out of subsequent profits, and not out of capital, even

where incurred during a prior life-tenancy, and though the business be carried on by a receiver under an order of the Court: *Upton* v. *Brown*, 26 Ch. D. 588. And where the sailing of several ships resulted as to some in loss and as to others in profit, the life-tenant was held entitled only to the net profit of all taken together, after deducting the loss in respect of all: *Re Clapham*, W. N. 1886, 54.

Special provisions.

The above rules, however, may be varied by express provision in the settlement. For example, where settled residue comprised a business which the trustees were empowered to carry on, and the will provided that the net profits should be treated as income, and that losses should be defrayed out of the estate, it was held that losses (though not the rent of the business premises) must be borne by capital: *Re Millichamp*, 52 L. T. 758.

Loss for benefits of estate.

In one case, where a leasehold circus forming part of residue settled by way of trust for sale, was carried on by trustees at a loss because it could not be profitably sold, each year's loss was ordered to be apportioned between capital and income on the footing of such loss representing the accumulation of a sum at compound interest at 4 per cent. from the time when the business ought to have been sold: the amount representing such interest being charged against income, and the residue of the loss against capital: *Re Hengler*, (1893) 1 Ch. 586.

But the order in that case apparently proceeded on the admission of the parties that the rule in *Chesterfield's* case (see *post*, p. 154) applied: a proposition open to question, as it seems contrary to principle to throw a continually increasing proportion of each year's loss on the life-tenant when the sale is delayed for the benefit of the estate: and it is submitted that in such a case the entire loss should be borne by capital, as in the case of outgoings of unproductive leaseholds: see *Lonsdale* v. *Berchtoldt*, 3 K. & J. 185.

Chap. IX.

Investments securing fixed interest.

Where settled funds are invested so as to secure both capital and interest at a fixed rate, the Court apportions a loss of income between life-tenant and remainderman: and in such cases, if the income falls into arrear, the life-tenant is entitled to a proportionate part of the amount realized by sale of the investment in respect of the amount due for income, although part of the capital be also lost: *Re Atkinson*, (1904) 2 Ch. 160; the terms, however, on which the life-tenant is entitled to share in the proceeds of realization are dependent on the question whether the investment is authorized or not.

Authorized investments.

Where the loss of income occurs in respect of an authorized investment, securing both capital and interest at a fixed rate, the apportionment is made without requiring the life-tenant to bring into account any past income which he has received: *Re Atkinson*, (1904) 2 Ch. 160 (overruling *Re Foster*, 45 Ch. D. 629, and *Re Phillimore*, (1903) 1 Ch. 942).

Mortgage.

Thus, where trust funds are properly invested on mortgage and the interest falls into arrear, if the security realizes less than the principal and arrears of interest, the proceeds are divisible between the life-tenant and remainderman in shares bearing the same proportion to each other as the arrears of interest and the principal, without taking into account any income previously received by the life-tenant: *Re Atkinson*, (1904) 2 Ch. 160; *Re Moore*, 54 L. J. Ch. 432; *Lyon* v. *Mitchell*, (1899) W. N. 27; *Re Alston*, (1901) 2 Ch. 584; *Re Ancketill*, 27 L. R. Ir. 331; *Stewart* v. *Kingsale*, (1902) 1 I. R. 496; and the life-tenant's right to apportionment in such a case has been held not to be defeated by a provision in the settlement that property not actually producing income shall not be treated as producing income: see *Re Hubbuck*, (1896) 1 Ch. 754.

Compound interest is not allowed: *Re Moore*, 54 L. J. Ch. 432; but where the interest secured was reducible

on punctual payment, interest at the higher rate was allowed: see *Re Atkinson*, (1904) 2 Ch. 160.

In one case, sums recovered out of past income of a mortgaged estate, after the death of several successive life-tenants and pending foreclosure proceedings, were ordered to be apportioned rateably between arrears of interest due to the successive life-tenants and remainderman, without reference to the period during which such income had accrued; and future rents were dealt with in the same way: see *Re Broadwood*, (1908) 1 Ch. 115. But it is conceived that the apportionment in the last case would be treated as provisional only and subject to adjustment when the mortgaged estates were realized: see *Re Atkinson*, (1904) 2 Ch. 160.

Legacy.

Where a loss of income occurs in respect of a settled legacy, and the residue is only sufficient to make good part of the loss, apportionment is allowed on the same terms as in the case of an authorized investment.

Thus, where the estate is insufficient at the death to provide a settled legacy, any fund which afterwards becomes available is divisible rateably between capital and income so as to give the life-tenant a sum equivalent to interest on the amount invested to answer the legacy, as from the end of a year after the death (*Re Dufferin*, W. N. 1867, 75); or from the death, if so provided by the will: *Re Tinkler*, 20 Eq. 456.

So, where a fund was charged by will on residue in favour of a life-tenant and remainderman, and the interest fell into arrear, and the residue realized less than the principal, the proceeds were held to be divisible between the life-tenant and remainderman in shares bearing the same proportion to each other as the arrears of interest and the principal: *Re Barker*, (1897) W. N. 154.

In the above cases of settled legacies, the life-tenant was allowed interest at 4 per cent.; and this seems to

Chap. IX.

be still the rule by reason of R. S. C., 1883, Order LV. r. 64; see *Re Davy*, (1908) 1 Ch. 61.

Annuity fund.

A fund directed to be set apart out of residue to answer annuities with a gift of the capital to the surviving annuitant, stands on the same footing as a settled legacy; and where such a fund was misappropriated by the executor after the annuities had been regularly paid for some years, further assets which only become available after the death of all the annuitants, were held to be divisible rateably between the arrears due to them and the capital due to the survivor: *Innes* v. *Mitchell*, 1 Ph. 710; 2 Ph. 346.

Unauthorized investments.

Where a loss of income occurs in respect of an unauthorized investment securing both capital and interest at a fixed rate, the life-tenant and remainderman share the loss in the same way as if it had occurred when they first became entitled in possession to the investment: see *Cox* v. *Cox*, 8 Eq. at p. 344; *Re Bird*, (1901) 1 Ch. at p. 919; and if the life-tenant has received any income from the investment, he is only allowed an apportionment of the amount realized by its sale on the terms of his bringing into account all income so received by him: *Re Bird*, (1901) 1 Ch. 916; see *Re Atkinson*, (1904) 2 Ch. at p. 167.

Bond debt.

Until recently, the apportionment proceeded on the basis of the life-tenant being entitled to interest at the rate of 4 per cent. Thus, where settled residue included a bond debt, bearing interest at 5 per cent., and only part of the amount due could be recovered, and that not until some years after the testator's death, the life-tenant was allowed so much of the sum recovered as was equal to interest at 4 per cent. on the balance of the sum recovered from the end of a year from the death: *Turner* v. *Newport*, 2 Ph. 14. So, where only part of a fund covenanted to be paid to the trustees of the settlement with 5 per cent. interest from the

Covenant to pay.

settlor's death was recovered several years afterwards, without interest, such part of the sum recovered as would with 4 per cent. interest from the death have amounted to the sum recovered, was treated as capital, and the balance as interest belonging to the life-tenant: *Cox* v. *Cox*, 8 Eq. 343.

Mortgage of colliery.

In a recent case where a mortgage debt secured on a colliery formed part of residue and the interest was in arrear, rents and profits received by a receiver pending foreclosure proceedings were ordered to be divided between the life-tenant and remainderman in accordance with the rule in *Chesterfield's* case (*post*, p. 154): the life-tenant's proportion being calculated at 4 per cent. compound interest: *Re Godden*, (1893) 1 Ch. 292. But in a later case decided by the Court of Appeal, where interest on a debt forming part of residue was in arrear, and the trustees took from the debtor, as security, a mortgage of several life policies, which ultimately realized less than the debt, and no interest had been paid, the life-tenant appears to have been allowed only such a proportion of the proceeds as the interest on the debt bore to the capital and interest secured: see *Re Hubbuck*, (1896) 1 Ch. 754.

Rate of interest.

Owing to the reduced rate of interest obtainable a few years ago from trust securities, the present practice in cases of loss arising from unauthorized investments, seems to be to allow only 3 per cent. or consol interest.

Thus, where a trustee had sold out consols and invested the proceeds on an equitable mortgage of his own property, which proved insufficient, the Court ordered the proceeds realized by the sale of the mortgaged property, plus the income actually received therefrom by the life-tenant, to be divided between her and the remainderman in shares bearing the same proportion to each other as the amount of the dividends produced by the consols, between the dates of their sale and the life-tenant's death, and the cash value

Chap. IX.

of the consols at her death, bore to each other: *Re Bird*, (1901) 1 Ch. 916.

Time for apportionment.

Where apportionment is allowed, it is in general made at the time when the investment is realized, the account being carried up to that date if the life-tenant is living: *Re Alston*, (1901) 2 Ch. 684; *Re Moore*, 54 L. J. Ch. 432; see *Re Atkinson*, (1904) 2 Ch. at p. 169; but if the life-tenant has died before the apportionment, the account is taken up to his death: see *Re Bird*, (1901) 1 Ch. 916; and see *Lyon* v. *Mitchell*, (1899) W. N. 27.

Where only part of an insufficient investment is realized, any apportionment then made is without prejudice to a final adjustment when the investment is completely realized: see *Re Atkinson*, (1904) 2 Ch. 160.

Loss of capital.

The life-tenant's right to the whole income of all authorized investments is not affected by any shrinkage or decrease in their value; and if one of several such investments fails, the remainderman is not entitled to have it replaced out of the income of the remaining investments: *Verner* v. *Gen. Com. Invest. Trust*, (1894) 2 Ch. at pp. 258, 270.

Depreciated security.

A fortiori, the depreciation in value of an unrealized investment securing interest at a fixed rate, affords no ground for setting aside any part of the income to recoup the probable loss of capital: see *Re Broadwood*, (1908) 1 Ch. 115.

Refunding income.

The life-tenant is not liable to refund any income actually received by him to make good a loss of capital, where the investment is authorized, even though it be of a hazardous nature, producing more than 4 per cent. interest: *Learoyd* v. *Whiteley*, 12 App. Cas. 727; and see *Shore* v. *Shore*, 4 Dr. at p. 510; and where the investment is made by the trustees without uthority, the

life-tenant if not cognizant of the breach of trust, is not liable to refund income to make good a loss of capital, although the investment secures both capital and interest at a fixed rate: *Re Bird*, (1901) 1 Ch. 916.

But where the life-tenant received income with knowledge of the impropriety of the investment, he was ordered to account for the excess of income, above 4 per cent., of the sum invested: see *Baynard* v. *Woolley*, 20 Beav. 583; *Griffiths* v. *Porter*, 25 Beav. 236.

And where an unauthorized investment is made at the instance of the life-tenant to increase his income, and the security proves insufficient, he is liable to recoup capital the amount of income received by him: *Raby* v. *Ridehalgh*, 7 D. M. & G. 104.

CHAPTER X.

RESIDUARY PERSONALTY.

Chap. X.

Rule in *Allhusen* v. *Whittell*.

According to the rule laid down in *Allhusen* v. *Whittell*, 4 Eq. 295, the life-tenant of residuary personal estate is not entitled to any income arising from so much of the estate as is required for payment of debts, funeral and testamentary expenses and immediate legacies, as that never becomes part of the residue: the rule being that such debts, expenses and legacies are to be provided rateably out of the capital and first-year's income of the personal estate: such part of the capital being applied for the purpose as with the income of that part for the first year after the death, is sufficient to raise the amount required: *Allhusen* v. *Whittell*, 4 Eq. 295.

The rule is founded on the decisions in *Amphlett* v. *Parke*, 1 Sim. 275; 4 Russ. 75; and *Holgate* v. *Jennings*, 24 Beav. 623, and has been held to apply although all the debts, expenses and legacies were actually paid within the year, and the year's income greatly exceeded 5 per cent. on the capital: *Lambert* v. *Lambert*, 16 Eq. 320.

Departure from rule.

The above rule is, however, inconsistent with the principle enunciated by V. C. Knight Bruce in *Caldecott* v. *Caldecott*, 1 Y. & C. Ch. 312, that the funeral and testamentary expenses and the debts and legacies (as to principal) must be borne by capital—the interest upon the debts and legacies by the life-tenant: see also *Barnes* v. *Bond*, 32 Beav. 653; and as there is often considerable difficulty in applying the rule in practice, it is not always followed.

Thus, a sum paid by executors, several years after their testator's death, by way of compromise of liability for breach of trust, has been treated as made up of a debt owing at the death and subsequent interest thereon at 4 per cent.: the part representing principal being charged against capital, and the part representing interest against income: *Maclaren* v. *Stainton*, 11 Eq. 382; and see *Re Dawson*, (1906) 2 Ch. 211, stated on p. 134.

Mixed fund.

Residuary real estate devised upon trust for sale with the general personal estate seems not to be within the rule in *Allhusen* v. *Whittell*, as the proceeds do not strictly form part of the general personal estate, although made a mixed fund with it: see *Smith* v. *Claxton*, 4 Madd. at p. 492; *Re Spencer Cooper*, (1908) 1 Ch. at p. 133.

Contingent debts.

Where the estate is liable under covenants entered into by the testator for sums payable on a contingency, and the estate is sufficient, the life-tenant seems entitled to the intermediate income of any fund set aside to provide against the contingency: see *Abrahall* v. *Hamilton*, 10 Ir. Ch. Rep. 51; but where the capital was insufficient to satisfy the contingent liability, and the life-tenant could not give security for refunding, the income was ordered to be accumulated until the contingency happened or failed: *Fletcher* v. *Stevenson*, 3 Ha. 360.

Annuities covenanted to be paid.

Life annuities which the testator has covenanted to pay, being, in effect, contingent debts payable by instalments, have in several cases been treated in the same way as other contingent debts. Thus, in one case, it was held by Kekewich, J., that each instalment of such an annuity was payable out of capital as it became due (*Re Bacon*, 62 L. J. Ch. 445); and in another case, where the annuity was several years after

Chap. X.

the testator's death, commuted for a lump sum, that was also held by the same Judge to be payable out of capital (*Re Henry*, (1907) 1 Ch. 30): the rule applicable to annuities charged on real estate being followed in both cases (see *ante*, p. 111).

Another method of apportionment, however, was adopted by Eady, J., in *Re Dawson*, (1906) 2 Ch. 211 (following *Yates* v. *Yates*, 28 Beav. 637), where each instalment was directed to be paid rateably by the life-tenant and remainderman in proportion to the actuarial values of their interests at the testator's death; while in a still more recent case, the proportion of each instalment chargeable against capital was held by the same Judge to be such a sum as if invested at 3 per cent. simple interest at the time when the life estate vested in possession, would, with the interest accruing thereon, produce the instalment by the time it became due: *Re Perkins*, (1907) 2 Ch. 596; and this has been followed by Joyce, J., in *Re Thompson*, (1908) W. N. 195.

Outgoings.

Ordinary outgoings of property forming part of residuary personal estate are payable out of income in the same way as outgoings of property specifically settled: see Chap. IV.

Interest on legacies.

Interest on legacies is in general payable out of income of residue; but where the residue was invested at a lower rate than 4 per. cent., it was held that the difference between the rate produced and 4 per cent. must come out of capital: *Massy* v. *Gahan*, 23 L. R. Ir. 518.

Annuities given by will.

Annuities given by the will, whether for life or for a term of years, are payable out of the income of residue; and the life-tenant of residue is not entitled to have a government annuity purchased out of capital to satisfy them: *Re Grant*, 52 L. J. Ch. 552; see *Scholefield* v. *Redfern*, 2 Dr. & Sm. 173.

A fund directed to be set apart to answer ordinary

life annuities, is residue so far as not required; so that the life-tenant of residue is entitled to surplus income set free by the death of an annuitant: *Gibbs* v. *Gibbs*, 26 L. T. 865.

Portions fund.

So, where a fund is directed to be appropriated to answer portions, the life-tenant of residue is entitled to the income of the balance of the fund remaining after the portions are satisfied: *Re Phillips*, 49 L. J. Ch. 198.

Contingent legacy fund.

Any fund merely required to answer contingent liabilities under the will is in the meantime treated as residue.

Hence, the life-tenant of residue is entitled to the intermediate income of a fund set apart to answer contingent legacies: *Crawley* v. *Crawley*, 7 Sim. 427; *Morgan* v. *Morgan*, 4 De G. & S. 164; *Allhusen* v. *Whittell*, 4 Eq. 295; or reversionary life annuities (*Cranley* v. *Dixon*, 23 Beav. 512), or conditional annuities (*Re Whitehead*, (1894) 1 Ch. 678; *contra*, *Tucker* v. *Boswell*, 5 Beav. 607).

And it makes no difference that the fund is directed to form part of residue on failure of the contingency: *Fullerton* v. *Martin*, 1 Dr. & Sm. 31; *Edmunds* v. *Waugh*, 2 N. R. 408.

Accumulations of income of legacy.

Where a contingent legacy, given with accumulations of income fails, the life-tenant of residue is entitled to the accumulations made in his lifetime within legal limits: *Morgan* v. *Morgan*, 4 De G. & S. 164.

But where the interest of a legacy is directed to be accumulated beyond the period allowed by law, the interest accruing after that period on both legacy and accumulations forms part of the capital of residue: *Crawley* v. *Crawley*, 7 Sim. 427; *O'Neill* v. *Lucas*, 2 Keen, 313; but see *Morgan* v. *Morgan*, 4 D. G. & S. 164.

So, where a trust for accumulating surplus rents of specifically devised freeholds exceeded twenty-one years from the testator's death, it was held that surplus rents

Chap. X.

arising after that period fell into residue as capital: *Re Pope*, (1901) 1 Ch. 64; but see *Re Phillips*, 49 L. J. Ch. 198.

Accumulations during minority.

Accumulations of income, made during the minority of a life-tenant who has a vested interest, belong to him, notwithstanding sect. 43 of the Conveyancing Act, 1881; *Re Wells*, 43 Ch. D. 281; *Re Humphreys*, (1893) 3 Ch. 1.

But where the life-tenant's interest is contingent on attaining twenty-one, he is not entitled to interest accruing before the contingency happens, as that becomes an accretion to capital: *Re Bowlby*, (1904) 2 Ch. 685 (overruling *Re Scott*, (1902) 1 Ch. 918).

Income of residue.

The life-tenant of residuary personal estate is not, as a matter of course, entitled to the whole income actually produced thereby: the question whether he is so entitled or not, in the absence of express provision, depends on the way in which the residue is invested—that is to say, whether the investments are authorized or unauthorized.

Authorized investments.

In the case of authorized investments existing at the testator's death, the life-tenant takes the income actually produced from the death, notwithstanding a trust for conversion: *Hewitt* v. *Morris*, T. & R. 241; *La Terriere* v. *Bulmer*, 2 Sim. 18; *Allhusen* v. *Whittell*, 4 Eq. 295; securities in which investment is authorized by the will, standing on the same footing as securities authorized by law for the investment of trust funds: *Brown* v. *Gellatly*, 2 Ch. 751; *Re Chaytor*, (1905) 1 Ch. 233.

The rule is the same where residuary personalty is directed to be invested in land and settled: the life-tenant being entitled to the income of such part as consists of authorized trust securities as from the testator's death, in the absence of any direction to the contrary: *Angerstein* v. *Martin*, T. & R. 232; *Caldecott* v. *Caldecott*, 1 Y. & C. Ch. 312; *Macpherson* v. *Macpherson*, 1 Macq. 243. And where the intermediate income is

directed to be accumulated until investment, the Court stops the accumulation at the end of a year from the death: *Sitwell* v. *Bernard*, 6 Ves. 520; *Kilvington* v. *Gray*, 2 Sim. & St. 396; *Tucker* v. *Boswell*, 5 Beav. 607; see *Caldecott* v. *Caldecott*, 1 Y. & C. Ch. 312; and see *Entwistle* v. *Markland*, 6 Ves. 528 n.; *Stuart* v. *Bruere*, 6 Ves. 529 n.

Where existing investments become authorized by statute after the death, the life-tenant is entitled to the whole income from the time when they become authorized: *Hume* v. *Richardson*, 4 D. F. & J. 29.

In the case of authorized investments made after the death, the life-tenant takes the whole income from the date of investment: *La Terriere* v. *Bulmer*, 2 Sim. 18.

Unauthorized investments.

The life-tenant of residue is not in the absence of express provision entitled to the income produced by unauthorized investments; the rule being that such investments must be converted into consols or other authorized securities of a permanent nature for the benefit of all parties interested: *Howe* v. *Dartmouth*, 7 Ves. 137; see *Baud* v. *Fardell*, 7 D. M. & G. 628.

Rule in *Howe* v. *Lord Dartmouth*.

This rule (commonly called 'the Rule in *Howe* v. *Lord Dartmouth*') does not proceed on any presumed intention of the testator that the property should be converted, but is based on the presumption that he intended it to be enjoyed by different persons in succession; an intention which can only be carried out by means of conversion and investment in permanent securities: see *Alcock* v. *Sloper*, 2 M. & K. at p. 701; *Hinves* v. *Hinves*, 3 Ha. at p 611; *Cafe* v. *Bent*, 5 Ha. at p. 35; *Pickup* v. *Atkinson*, 4 Ha. at p. 628; *Morgan* v. *Morgan*, 14 Beav. at p. 82; *Macdonald* v. *Irvine*, 8 Ch. D. at p. 121; *Re Van Straubenzee*, (1901) 2 Ch. at p. 782; *Re Bates*, (1907) 1 Ch. at p. 26.

Wasting property.

The rule applies with special force to property of a wasting or perishable nature, such as:—

Chap. X.

(1) Terminable annuities: *Howe* v. *Dartmouth*, 7 Ves. 137; *Sutherland* v. *Cooke*, 1 Coll. 498; *Lichfield* v. *Baker*, 13 Beav. 447; *Preston* v. *Melville*, 15 Sim. 35; *James* v. *Gammon*, 15 L. J. Ch. 217; *Morgan* v. *Morgan*, 14 Beav. 72; *Hood* v. *Clapham*, 19 Beav. 90; *Pidgeon* v. *Spencer*, 16 L. T. 83.

(2) Leaseholds: *Benn* v. *Dixon*, 10 Sim. 636; *Sutherland* v. *Cooke*, 1 Coll. 498; *Johnson* v. *Johnson*, 2 Coll. 441; *Pickup* v. *Atkinson*, 4 Ha. 624; *Chambers* v. *Chambers*, 15 Sim. 183; *Morgan* v. *Morgan*, 14 Beav. 72; *Craig* v. *Wheeler*, 29 L. J. Ch. 374; *Re Llewellyn*, 29 Beav. 171; *Green* v. *Britten*, 42 L. J. Ch. 187; *Re Smith*, 48 L. J. Ch. 205; *Re Game*, (1897) 1 Ch. 881; *Lyons* v. *Harris*, (1907) 1 I. R. 32.

(3) Consumables, furniture, and live stock: *Smith* v. *Pugh*, 6 Jur. 701; *Hood* v. *Clapham*, 19 Beav. 90; *Arnold* v. *Ennis*, 2 Ir. Ch. Rep. 601; see *Randall* v. *Russell*, 3 Mer. at p. 195; *Benn* v. *Dixon*, 10 Sim. at p. 639.

Unauthorized investments.

But the rule also applies to all other property not authorized by law for the investment of trust funds, unless expressly authorized by the will, for example:—

(1) Bond debts: *Johnson* v. *Johnson*, 2 Coll. 441.

(2) Foreign bonds, such as Dutch bonds (*Blann* v. *Bell*, 2 D. M. & G. 775) or Egyptian bonds: *Macdonald* v. *Irvine*, 8 Ch. D. 101.

(3) A business: *Offen* v. *Reeve*, 24 L. T. O. S. 172; *Kirkman* v. *Booth*, 11 Beav. 273; *Re Chancellor*, 26 Ch. D. 42.

(4) A share in a partnership: *Fearns* v. *Young*, 9 Ves. 549; *Taylor* v. *Clark*, 1 Ha. 161; *Meyer* v. *Simonsen*, 5 De G. & S. 723; see *Stainer* v. *Hodgkinson*, 52 W. R. 260.

(5) Canal shares: *Blann* v. *Bell*, 2 D. M. & G. 775; unless within the Trustee Act, 1893, 56 & 57 Vict. c. 53, s. 1 (re-enacting 52 & 53 Vict. c. 32, s. 3).

(6) Gas stock: *Re Eaton*, 70 L. T. 761.

(7) Railway shares: *Thornton* v. *Ellis*, 15 Beav. 193;

unless within the Trustee Act, 1893, 56 & 57 Vict. c. 53, s. 1 (re-enacting 52 & 53 Vict. c. 32, s. 3).

(8) Waterworks shares: *Furley* v. *Hyder*, 42 L. J. Ch. 626.

(9) Shares in insurance and other companies: *Blann* v. *Bell*, 2 D. M. & G. 775; *Johnson* v. *Johnson*, 2 Coll. 441; see *Re Bates*, (1907) 1 Ch. at p. 26.

(10) Reversionary and deferred interests in personal estate: see *post*, p. 154.

Bank stock and East India stock.

Bank stock and East India stock were within the rule until made authorized investments by 22 & 23 Vict. c. 35, s. 32: see *Howe* v. *Dartmouth*, 7 Ves. 137; *Hume* v. *Richardson*, 4 D. F. & J. 29; and see now 56 & 57 Vict. c. 53, s. 1 (re-enacting 52 & 53 Vict. c. 32, s. 3, which replaced 22 & 23 Vict. c. 35, s. 32).

Real securities.

Real securities, although at one time unauthorized investments, have never been within the rule; the practice having been not to order their conversion without an inquiry whether it would be for the benefit of all parties: see *Howe* v. *Dartmouth*, 7 Ves. 137: and see now 56 & 57 Vict. c. 53, s. 1 (re-enacting 52 & 53 Vict. c. 32, s. 3, which replaced 22 & 23 Vict. c. 35, s. 32).

Income of unauthorized investments.

If unauthorized investments existing at the testator's death are improperly retained, the life-tenant is entitled, as from the death, during such retention, to an income equal to the dividends of the consols which would have been produced by conversion and investment in consols at the end of a year from the death: *Morgan* v. *Morgan*, 14 Beav. 72; *Brown* v. *Gellatly*, 2 Ch. 751 (not following *Robinson* v. *Robinson*, 1 D. M. & G. 247, where 4 per cent. on the value was allowed).

In the above cases there was no trust for sale, and it has been said that where there is an immediate trust for sale, the time at which this 'notional conversion' and investment in consols is deemed to be made is the

Chap. X.

testator's death: see *Re Woods*, (1904) 2 Ch. at p. 12; *Johnson* v. *Routh*, 27 L. J. Ch. at p. 308; and the value was accordingly taken at the death in those cases, and also in *Hume* v. *Richardson*, 4 D. F. & J. 29; *Allhusen* v. *Whittell*, 4 Eq. 295; *Jackson* v. *Jackson*, 17 W. R. 547; *Furley* v. *Hyder*, 42 L. J. Ch. 626; and *Re Chaytor*, (1905) 1 Ch. 233; but in other cases the value has been taken at the end of a year from the death: see *Dimes* v. *Scott*, 4 Russ. 195; *Mehrtens* v. *Andrews*, 3 Beav. 72; *Taylor* v. *Clark*, 1 Ha. 161; *Robinson* v. *Robinson*, 1 D. M. & G. 247; *Re Duckworth*, 35 S. J. 561; *Re Lynch Blosse*, W. N. 1899, 27; *Caldecott* v. *Caldecott*, 1 Y. & C. Ch. 312, 737.

In *Re Smith*, 48 L. J. Ch. 205, where the residue was only settled in the event of marriage, the value was taken at the marriage.

Where conversion within the year.

In all the above cases, conversion had been delayed for more than a year after the death; but it is apprehended that where conversion takes place within the year, the life-tenant has the same right to interest from the death to the date of conversion, although in two of the earlier cases, *Gibson* v. *Bott*, 7 Ves. 89, and *La Terriere* v. *Bulmer*, 2 Sim. 18 (decided before the rule was settled), the life-tenant was only allowed interest from the date of conversion: see *Macpherson* v. *Macpherson*, 1 Macq. 243.

Overruled cases.

The cases of *Stott* v. *Hollingworth*, 3 Madd. 161, and *Taylor* v. *Hibbert*, 1 J. & W. 308 (where the life-tenant was allowed no income during the first year), and *Douglas* v. *Congreve*, 1 Keen, 410 (where the income actually produced during the first year was allowed), are overruled in this respect by *Macpherson* v. *Macpherson*, 1 Macq. 243, and the cases above mentioned.

Consols standard.

Consols have been taken as the standard because they are regarded as absolutely safe; and the rule is therefore still the same notwithstanding the reduced rate of interest of the new consols, and the increased

range of authorized securities: *Re Duckworth*, 35 S. J. 561.

Investments retained for benefit of estate.

Old rule.

Unauthorized investments producing more than 4 per cent. interest and retained for the benefit of the estate, either in the absence of a trust for conversion or under a power to continue existing investments, until recently stood on a distinct footing: the practice having been to allow the life-tenant as from the death, interest on the value, at the rate of 4 per cent.: the balance of the interest produced being treated as capital and invested, and the dividends on the investments paid to the life-tenant: *Meyer* v. *Simonsen*, 5 De G. & S. 723; see *Re Chancellor*, 26 Ch. D. at p. 46; *Wentworth* v. *Wentworth*, (1900) A. C. at p. 171.

Thus, where a share in a partnership, carrying interest at 5 per cent., was retained because it could not be realized at once except at a loss, the life-tenant was allowed 4 per cent. interest on the capital, besides the income produced by the investment of the surplus interest: *Meyer* v. *Simonsen*, 5 De G. & S. 723; *Re Llewellyn*, 29 Beav. 171; a similar allowance being made in the case of a business: *Offen* v. *Reeve*, 24 L. T. O. S. 172; and in the case of stocks and shares producing a high rate of interest: *Furley* v. *Hyder*, 42 L. J. Ch. 626; *Re Eaton*, 70 L. T. 761; see *Caldecott* v. *Caldecott*, 1 Y. & C. Ch. 312, 737; and in the case of ships earning large profits: *Cooper* v. *Laroche*, 38 L. J. Ch. 591; *Brown* v. *Gellatly*, 2 Ch. 751 (where there was an express power to sail the ships for the benefit of the estate).

And in one case, where a very profitable business was continued under an order of the Court at the request of all parties *sui juris*, the life-tenants were allowed interest at 5 per cent. on the capital employed, the surplus profits being accumulated to go with the capital: *Lambert* v. *Rendle*, 3 N. R. 247.

Chap. X.

New rule.

In consequence, however, of the reduced rate of interest obtainable from trust securities a few years ago (see *Re Nicholson*, (1895) W. N. 106), the practice was altered: the new rule being to allow the life-tenant only 3 per cent. interest from the death on the value at the end of a year from the death: see *Re Lynch Blosse*, (1899) W. N. 27; and although the price of trust securities has since fallen, so that a higher rate of interest is again obtainable, the new rule is still adhered to: *Re Woods*, (1904) 2 Ch. 4; *Re Chaytor*, (1905) 1 Ch. 233.

The balance of income produced by unauthorized securities above 3 per cent. has to be invested as capital, and the life-tenant is entitled to the income of such investments: *Re Woods*, (1904) 2 Ch. 4; *Re Chaytor*, (1905) 1 Ch. 233.

Wasting property.

Wasting property retained for the benefit of the estate has been treated in the same way as unauthorized investments similarly retained.

Thus, a life-tenant was allowed 4 per cent. interest on the value of leaseholds retained on account of a defect in title which rendered them unsaleable, notwithstanding a trust for conversion: *Gibson* v. *Bott*, 7 Ves. 89; see *Mehrtens* v. *Andrews*, 3 Beav. 72; *Green* v. *Britten*, 42 L. J. Ch. 187; and the Court seems to have had a discretion to allow the life-tenant 4 per cent. interest on the value of wasting property retained by an innocent mistake, where there was no trust for conversion: *Sutherland* v. *Cooke*, 1 Coll. 503.

But in the case of a terminable annuity, retained because the trustees were unable to sell, the instalments were ordered to be invested and the life-tenant was allowed the interest of the investments: *Crawley* v. *Crawley*, 7 Sim. 427; and where the residue comprised the intermediate income of a fund, set apart under another person's will to answer future vested legacies,

it was treated as a terminable annuity and dealt with in the same way: *Re Whitehead*, (1894) 1 Ch. 678.

And now, only 3 per cent. interest is allowed on the value of wasting property retained for the benefit of the estate, as in the case of other unauthorized securities: *Re Woods*, (1904) 2 Ch. 4; but the life-tenant also gets the income of investments of surplus income: *Ib.*

Refunding overpayments.

If the life-tenant receives the whole income of unauthorized investments, he is liable to refund the excess over the income to which he is entitled: *Hood* v. *Clapham*, 19 Beav. 90; see *Lichfield* v. *Baker*, 13 Beav. 447; *Robinson* v. *Robinson*, 1 D. M. & G. at p. 264; and if he receives the whole income of leaseholds or terminable annuities until they expire, he is liable to recoup the amount which would have been produced by their conversion: *Tickner* v. *Old*, 18 Eq. 422; and see *Mehrtens* v. *Andrews*, 3 Beav. 72.

But the life-tenant was held not liable to refund after a lapse of thirty years, where the wasting property was retained against her wish: *Bate* v. *Hooper*, 5 D. M. & G. 338; and if the remainderman, being also the executor, allows the life-tenant to receive the whole income for a long period, it may be doubted whether he could afterwards call on him to refund: see *Pickering* v. *Pickering*, 4 My. & Cr. 289.

Investments in breach of trust.

Unauthorized investments, made by trustees in breach of trust, stand on a distinct footing: the life-tenant being entitled to the whole income produced thereby: *Stroud* v. *Gwyer*, 28 Beav. 130; *Slade* v. *Chaine*, (1908) 1 Ch. 522: see *ante*, p. 9.

Exclusion of rule in *Howe* v. *Lord Dartmouth*.

The rule in *Howe* v. *Lord Dartmouth*, may be excluded if the will discloses an intention, either by express

Chap. X.

declaration or by necessary implication, that the property shall be enjoyed in its existing state: *Pickering* v. *Pickering*, 4 My. & Cr. 289; *Hinves* v. *Hinves*, 3 Ha. 609; *Thursby* v. *Thursby*, 19 Eq. at p. 410; *Re Bates*, (1907) 1 Ch. at p. 26; the question in every case being one of construction: see *Lichfield* v. *Baker*, 2 Beav. at p. 487; *Morgan* v. *Morgan*, 14 Beav. at p. 82; *Daniel* v. *Warren*, 2 Y. & C. Ch. at p. 293.

But the onus of pointing out the words in the will which exclude the rule, lies on those who contend that the rule is excluded: *Sutherland* v. *Cooke*, 1 Coll. 498; *James* v. *Gammon*, 15 L. J. Ch. 217; *Cotton* v. *Cotton*, 14 Jur. 950; *Morgan* v. *Morgan*, 14 Beav. 72; *Blann* v. *Bell*, 2 D. M. & G. 775; *Macdonald* v. *Irvine*, 8 Ch. D. 101; *Re Game*, (1897) 1 Ch. 881; *Re Bentham*, 94 L. T. 307; *Lyons* v. *Harris*, (1907) 1 I. R. 32.

Tendency of cases.

The rule in *Howe* v. *Lord Dartmouth* is, however, purely an artificial one, and often calculated to defeat what the testator would have wished: so that the tendency of the cases has been to allow small indications of intention to exclude the rule: the provisions most frequently relied on being directions for the enjoyment or management of the property which would be defeated by conversion at the testator's death: see *Hinves* v. *Hinves*, 3 Ha. 609; *Cotton* v. *Cotton*, 14 Jur. 950; *Morgan* v. *Morgan*, 14 Beav. at pp. 82, 86; *Simpson* v. *Lester*, 4 Jur. N. S. 1269; and some of the cases have probably gone too far in this direction: see *Blann* v. *Bell*, 2 D. M. & G. at p. 779; *Craig* v. *Wheeler*, 29 L. J. Ch. at p. 376.

Partial exclusion of rule.

But the fact of an intention being shown against the conversion of one kind of property, does not necessarily exclude the rule in the case of other property; *Blann* v. *Bell*, 2 D. M. & G. 775; *Hood* v. *Clapham*, 19 Beav. 90; *Porter* v. *Baddeley*, 5 Ch. D. 542.

Trust for conversion.

Where there is an unqualified trust for conversion at

the testator's death, no question can arise as to the application of the rule in *Howe* v. *Lord Dartmouth*: see *Bate* v. *Hooper*, 5 D. M. & G. at p. 344; *Thursby* v. *Thursby*, 19 Eq. at p. 408.

A direction to convert specified parts of the residue does not in general entitle the life-tenant to the enjoyment of the remainder in specie: *Hood* v. *Clapham*, 19 Beav. 90; but may do so if expressed in such a way as to show an intention that the remainder should be retained.

Thus, a direction to sell such part of the residue as the trustees should think necessary, and to pay off charges on the testator's leaseholds, and to pay the annual produce to one for life, was held to entitle the life-tenant to enjoy in specie such leaseholds as the trustees did not sell: *Re Sewell*, 11 Eq. 80.

So, a direction to convert the residue, except moneys in the public funds or stocks or government securities, has been held in several cases to entitle the life-tenant to enjoy long annuities in specie: *Howard* v. *Kay*, 6 W. R. 361; *Grant* v. *Mussett*, 8 W. R. 330; *Wilday* v. *Sandys*, 7 Eq. 455; but see *Tickner* v. *Old*, 18 Eq. 422, and *Reynolds* v. *Brown*, 1 W. R. 50 (where a similar exception was held to refer to such stocks only as were proper investments); and see *post*, p. 152.

Trust for conversion at life-tenant's death.

A trust to convert the residue at the death of the life-tenant, impliedly negatives earlier conversion, and therefore entitles the life-tenant to enjoy it in specie, even in the case of terminable annuities: *Alcock* v. *Sloper*, 2 My. & K. 699; or leaseholds: *Daniel* v. *Warren*, 2 Y. & C. Ch. 290; *Hunt* v. *Scott*, 1 De G. & S. 219; *Harvey* v. *Harvey*, 5 Beav. 134; or farming stock: *Rowe* v. *Rowe*, 29 Beav. 276; or partnership profits: *Greaves* v. *Smith*, 22 W. R. 388; see *Stainer* v. *Hodgkinson*, 52 W. R. 260; but cash must be invested to preserve it for the remainderman: *Re Holden*, 57 L. J. Ch. 648.

Chap. X.

The effect of a direction to convert at the life-tenant's death is not neutralized by a discretionary power of sale during his life, so long as such power is not exercised: *Greaves* v. *Smith*, 22 W. R. 388; see *Re Courtier*, 34 Ch. D. 136.

The decision in *Mills* v. *Mills*, 7 Sim. 501, seems not reconcilable with the other authorities.

Discretion as to time of sale.

A discretion given to the trustees as to the time of sale, under a trust for conversion, without any direction as to interim income, does not entitle the life-tenant to the specific enjoyment of wasting property or unauthorized securities, such as leaseholds: *Re Carter*, 41 W. R. 140.

But an express direction that the income of all unconverted property shall be paid to the life-tenant, entitles him to the whole income up to conversion, whether the property be of a wasting or permanent nature, in the absence of any improper delay: *Wrey* v. *Smith*, 14 Sim. 202; *Mackie* v. *Mackie*, 5 Ha. 70; *Sparling* v. *Parker*, 9 Beav. 524; see, however, *Caldecott* v. *Caldecott*, 1 Y. & C. Ch. 312.

Power to postpone conversion.

A power for the trustees to postpone conversion, without any direction as to the intermediate income, does not entitle the life-tenant to the income actually produced by unconverted investments of an unauthorized kind: see *Re Chancellor*, 26 Ch. D. at p. 46: *Re Chaytor*, (1905) 1 Ch. 233.

But if the power to postpone is coupled with a direction to apply intermediate income in the same manner as the income of the proceeds of conversion, it entitles the life-tenant to the actual income until conversion, provided there is no improper delay, even in the case of wasting or fluctuating property, such as:—

(1) Leaseholds and foreign stock: *Morley* v. *Mendham*, 2 Jur. N. S. 998.

(2) Mint or mining shares: *Murray* v. *Glasse*, 23 L. J. Ch. 126; *Waters* v. *Waters*, 32 L. T. 306 n.

(3) Ships: *Lean* v. *Lean*, 32 L. T. 305.

(4) A business, whether carried on merely for a short period for the purpose of selling it profitably as a going concern (*Re Chancellor*, 26 Ch. D. 42), or for a long period for the purpose of making profits: *Re Crowther*, (1895) 2 Ch. 56; and see *Re Norrington*, 13 Ch. D. 654.

(5) A share in a partnership business: *Johnston* v. *Moore*, 27 L. J. Ch. 453; or

(6) Shares in an insurance company or limited company: *Morley* v. *Mendham*, 2 Jur. N. S. 998; *Re Armitage*, (1893) 3 Ch. at p. 345; *Re Piercy*, (1907) 1 Ch. 289.

But in the case of a mortgage-debt, a provision giving the life-tenant the actual income does not entitle him to the rents of the mortgaged property if the trustees take possession, as such property does not become part of the estate unless foreclosed: *Re Godden*, (1893) 1 Ch. 292.

Power to retain.

A power for the trustees to retain existing investments included in a trust for conversion without any direction as to the income thereof, does not entitle the life-tenant to the income of terminable or wasting property: *Taylor* v. *Clark*, 1 Ha. 161; *Re Whitehead*, (1894) 1 Ch. 678; see *Tickner* v. *Old*, 18 Eq. 422; *Re Woods*, (1904) 2 Ch. at p. 11; nor to the income produced by unauthorized investments of a permanent nature, such as shares in a company: see *Furley* v. *Hyder*, 42 L. J. Ch. 626; *Re Chaytor*, (1905) 1 Ch. 233; *Re Lynch Blosse*, (1899) W. N. 27 (not following *Bulkeley* v. *Stephens*, 3 N. R. 105); and see *Re Thomas*, (1891) 3 Ch. at p. 486.

But if the power to retain is coupled with a direction that the income of the part retained, or of the investments for the time being representing residue, is to be applied in the same way as the income of the part converted, the life-tenant is entitled to the actual income of

Chap. X.

property retained, although of a wasting or fluctuating nature, provided there is no improper delay: *Scholefield* v. *Redfern*, 2 Dr. & Sm. 173, 181; *Solomon* v. *Solomon*, 10 L. T. 54; *Re Thomas*, (1891) 3 Ch. 482.

A power for the trustees to continue the estate in a business with the life-tenant's consent, with a direction to pay her the annual income of the trust funds, was held to entitle her to the profits of the business as income: *Lambert* v. *Lambert*, 20 W. R. 943; but see *Cooper* v. *Laroche*, 38 L. J. Ch. 591.

Where no trust for conversion.

The mere absence of a trust for conversion is not sufficient to exclude the rule in *Howe* v. *Lord Dartmouth*: see *Morgan* v. *Morgan*, 14 Beav. 72; *Holgate* v. *Jennings*, 24 Beav. at p. 629; *Stainer* v. *Hodgkinson*, 52 W. R. 260.

Direction not to sell.

But an express direction not to sell excludes the rule. Thus, a direction for the trustees not to sell ships forming part of residue has been held to entitle the life-tenant to the actual income derived therefrom: *Green* v. *Britten*, 1 D. J. & S. 649; see W. N. 1867, 217; and in one case, the circumstance that leaseholds were not to be converted, was considered favourable to the enjoyment of terminable annuities in specie: *Simpson* v. *Earles*, 11 Jur. 921.

Power to retain.

A power for the trustees to retain existing investments, without any direction as to the income thereof, where there is no trust for conversion, entitles the life-tenant to the income produced by retained investments of a permanent nature, although speculative or hazardous: *Re Sheldon*, 39 Ch. D. 50; *Re Bates*, (1907) 1 Ch. 22 (fully paid up shares in a colliery company); *Re Wilson*, (1907) 1 Ch. 394; but such a power has in several cases been held not to entitle him to the income of wasting property, such as terminable annuities (*Porter* v. *Baddeley*, 5 Ch. D. 542), or leaseholds (see *Re*

Llewellyn, 29 Beav. 171); or (*semble*) shares in a single ship company: see *Re Bates*, (1907) 1 Ch. at p. 29. This distinction, however, has been questioned in several cases: see *Re Bates*, (1907) 1 Ch. at p. 29; *Re Wilson*, (1907) 1 Ch. at p. 397; and see *Gray* v. *Siggers*, 15 Ch. D. at p. 77; and it has recently been held that, in the absence of a trust for conversion, the life-tenant is entitled to the whole income of all investments retained under such a power, whether of a wasting or permanent nature: see *Re Nicholson*, (1909) 2 Ch. 111, where the case of *Gray* v. *Siggers*, 15 Ch. D. 74, was treated as a decision on the life-tenant's right to income. It would seem, however, that the only question raised in that case was whether the trustees could retain wasting investments: see *Re Thomas*, (1891) 3 Ch. at p. 484.

Power to carry on business.

A power for the trustees to carry on a colliery business, with powers of leasing and sale, has been held to entitle the life-tenant to enjoy the produce of the collieries in specie: *Thursby* v. *Thursby*, 19 Eq. 395.

But where the will empowers the trustees to employ the residue in a partnership business, without providing for the application of the profits, the partnership articles (whether entered into by the testator, or by the trustees under a power in his will), regulate what is capital and what is income: *Straker* v. *Wilson*, 6 Ch. 503; *Stroud* v. *Gwyer*, 28 Beav. 130.

Power of sale.

A discretionary power of sale given to the trustees excludes the rule in *Howe* v. *Lord Dartmouth*, where there is no trust for conversion, since their discretion as to the time of sale is inconsistent with and negatives any intention of immediate conversion: *Skirving* v. *Williams*, 24 Beav. 275; *Simpson* v. *Lester*, 4 Jur. N. S. 1269; *Re Leonard*, 29 W. R. 234; *Burton* v. *Mount*, 2 De G. & S. 383; *Bowden* v. *Bowden*, 17 Sim. 65; *Hind* v. *Selby*, 22 Beav. 373; *Lane* v. *Brown*, 25 L. T. 152; and see *Re Pitcairn*, (1896) 2 Ch. 199.

Chap. X.

The rule is also excluded where the power of sale is given to the life-tenant: *Re Bentham*, 94 L. T. 307.

But a power of sale given to the first life-tenant seems not to entitle a subsequent life-tenant to enjoy the property in specie: see *Jebb* v. *Tugwell*, 20 Beav. 84.

A power to vary securities does not exclude the rule, as it shows that conversion was intended: *Morgan* v. *Morgan*, 14 Beav. 72; *Re Llewellyn*, 29 Beav. 171.

Gift of whole income.

The rule in *Howe* v. *Lord Dartmouth* may also be excluded by a clear gift to the life-tenant of the whole income produced by the residue in its existing state.

Examples:—

(1) A gift of 'the whole income' of testator's 'property of all descriptions' to his wife for life, 'at her own disposal but not to sell without the consent of all parties,' was held to entitle her to the income of leaseholds and terminable annuities in specie: *Hinves* v. *Hinves*, 3 Ha. 609.

(2) A direction to permit testator's wife to receive the net annual income actually produced by the trust property, however constituted or invested, was held to entitle her to enjoy partnership property in specie, notwithstanding a trust for sale: *Ibbotson* v. *Elam*, 1 Eq. 188.

(3) A trust to permit testator's wife to receive and take 'the clear rents, issues, and profits,' of his real and personal estate after paying outgoings, with a gift over of all his estate term and interest therein at her death, was held to entitle her to enjoy leaseholds in specie: *Harris* v. *Poyner*, 1 Dr. 174.

(4) A direction to pay testator's wife 'all rents, dividends or funded property, and all other rents or interest' to which he was entitled 'and at her death all the residue of his estate' to be divided, was held to entitle her to enjoy leaseholds in specie: *Marshall* v. *Bremner*, 2 Sm. & G. 237.

(5) A direction to pay testator's wife 'the interest, dividends, or income, of all moneys or stock' and of 'all other property whatsoever yielding income' at testator's death, during her life, 'the principal to remain untouched and at her death to be divided,' was held to entitle the life-tenant to the specific enjoyment of East India railway stock and Canadian government debentures and railway bonds: *Boys* v. *Boys*, 28 Beav. 436.

(6) A direction that the persons for the time being entitled to settled estates should receive the yearly dividends of the public or other funds and the yearly interest of other parts of the residue under letters of attorney and powers from the trustees, was held to entitle the life-tenant to enjoy long annuities in specie: *Neville* v. *Fortescue*, 16 Sim. 333.

(7) A gift of all and every part of testator's property 'in every shape and without any reserve and in whatever manner situated,' to his wife for life and at her death the property so left to be divided, was held to entitle her to enjoy leaseholds in specie: *Collins* v. *Collins*, 2 M. & K. 703.

(8) A gift of 'all the interest, rents, dividends, annual produce and profits, use and enjoyment' of all testator's estate and effects whatsoever, to his wife for life, with a gift over at her decease of 'the residue of' his estate and effects, was held to entitle her to enjoy leaseholds and a terminable annuity in specie: *Pickering* v. *Pickering*, 4 My. & Cr. 289; *Simpson* v. *Earles*, 11 Jur. 921; and see *Burton* v. *Mount*, 2 De G. & Sm. 383; *Howe* v. *Howe*, 14 Jur. 359. But a gift of residue to the wife (sole executrix) for life with full and absolute control over all the property, would not entitle her to enjoy it in specie: see *Pardoe* v. *Pardoe*, 82 L. T. 547.

Specific mention.

The mere enumeration of some wasting or insecure property in a residuary gift, is not in general sufficient to exclude the rule in *Howe* v. *Lord Dartmouth*, though

Chap. X.

there be no trust for conversion: *Sutherland* v. *Cooke*, 1 Coll. 498; *Pickup* v. *Atkinson*, 4 Ha. 624; see *Craig* v. *Wheeler*, 29 L. J. Ch. 374; unless there is a specific reference to the property as existing in the same form after or during the life-tenancy: see *Hubbard* v. *Young*, 10 Beav. 203; *House* v. *Way*, 12 Jur. 958; and see *Harris* v. *Poyner*, 1 Dr. 174; *Crowe* v. *Crisford*, 17 Beav. 507 (where there was a direction to renew leaseholds); *Holgate* v. *Jennings*, 24 Beav. 623 (where the testator directed two of the remaindermen to take as their shares the parts of the joint property which he held with them).

Enumeration excluding rule.

But the enumeration may be so worded as to exclude the rule.

Examples:—

(1) A gift of the residue of freehold and leasehold estates and all other estates and effects upon trust to pay the rents, profits, and annual produce, to one for life, was held to entitle the life-tenant to enjoy the leaseholds in specie: *Blann* v. *Bell*, 5 D. G. & S. 658; 2 D. M. & G. 775; *Hood* v. *Clapham*, 19 Beav. 90; *Re Elmore*, 9 W. R. 66; and see *Kirkman* v. *Booth*, 11 Beav. 273.

(2) A gift of residue, expressly including the leasehold cottage in which testator resided, to one for life upon trust to allow her sister to live with her in the cottage, rent free, was held to entitle the life-tenant to enjoy the furniture in the cottage in specie: *Cotton* v. *Cotton*, 14 Jur. 950.

(3) A gift of 'the residue of my property, all I do or may possess in the funds, copy or leasehold estates,' was held to entitle the life-tenant to enjoy terminable annuities in specie: *Bethune* v. *Kennedy*, 1 My. & Cr. 114; and see *Milne* v. *Parker*, 17 L. J. Ch. 194; *Sheppard* v. *Joynes*, 2 W. R. 26.

(4) A gift of 'the whole' of testator's property, specifying a leasehold house and long annuities, 'with

the residue and interest should there be any,' to one for life and then over, was held to entitle the life-tenant to enjoy the leasehold house and long annuities in specie: *Vaughan* v. *Buck*, 1 Ph. 75; see *Oakes* v. *Strachey*, 13 Sim. 414.

(5) A gift to testator's wife of 'all my real and personal estate for her use so long as she remains a widow, and at her death to be divided amongst my four children, also my shares and interests in' certain businesses, was held to entitle the widow to enjoy the profits of the businesses in specie: *Stainer* v. *Hodgkinson*, 52 W. R. 260.

Mixed residue.

The mere fact of real estate being included in the same gift does not exclude the rule: see *Howe* v. *Lord Dartmouth*, 7 Ves. 137; *Hinves* v. *Hinves*, 3 Ha. at p. 612; *Re Carter*, 41 W. R. 140; although it may be material in conjunction with other circumstances: see *Howe* v. *Howe*, 14 Jur. at p. 360.

Rents.

And the better opinion seems to be that the mere direction to pay 'rents' to the life-tenant, without any mention of leaseholds, is not a sufficient indication of intention that the life-tenant is to enjoy them in specie, if freeholds are also comprised in the residuary gift: *Pickup* v. *Atkinson*, 4 Ha. 624; see *Harris* v. *Poyner*, 1 Dr. at p. 179; *Craig* v. *Wheeler*, 29 L. J. Ch. at p. 376; although accompanied by a charge of annuities with power of distress: *Re Game*, (1897) 1 Ch. 881; but see *contra*, *Crowe* v. *Crisford*, 17 Beav. at p. 509; *Vachell* v. *Roberts*, 32 Beav. 140; *Goodenough* v. *Tremamondo*, 2 Beav. 512 (where the will was not executed so as to pass real estate); *Cafe* v. *Bent*, 5 Ha. 24 (where the trustees were directed to retain a percentage of the rents collected), and *Wearing* v. *Wearing*, 23 Beav. 99. The gift of a 'life-rent' of all testator's property does not point to enjoyment in specie: see *Re Bentham*, 94 L. T. 307.

Chap. X.

Reversionary interests.

Reversionary or deferred interests in personal estate, forming part of residue and producing no income, are within the rule in *Howe* v. *Lord Dartmouth*, and must accordingly be converted for the benefit of all parties interested, unless a contrary intention is shown by the will: this branch of the rule protecting the life-tenant, just as the other branch protects the remainderman: see *Howe* v. *Dartmouth*, 7 Ves. at p. 148; *Dimes* v. *Scott*, 4 Russ. at p. 200; *Johnson* v. *Routh*, 27 L. J. Ch. 305; *Harrington* v. *Atherton*, 2 D. J. & S. 352; *Napier* v. *Staples*, 10 Ir. Ch. Rep. 344; *Re Pitcairn*, (1896) 2 Ch. at p. 206.

Old rule.

In the earlier cases, where a reversionary interest had been allowed to remain until it fell into possession, the life-tenant was allowed simple interest at 4 per cent. from the testator's death on the value at the death or at the end of a year from the death, calculated on the assumption that it would fall in when it actually did: see *Fearns* v. *Young*, 9 Ves. 549; *Wilkinson* v. *Duncan*, 23 Beav. 469; *Jackson* v. *Jackson*, 17 W. R. 547; *Wright* v. *Lambert*, 6 Ch. D. 649; and a similar course was adopted where a reversionary interest was sold seven years after the death, in *Gibbs* v. *Gibbs*, 26 L. T. 865.

Rule in *Chesterfield's* case.

But it is now settled that where a reversionary or deferred interest, whether vested or contingent, is retained for a period after the death of the testator, in the absence of any provision as to intermediate income, the amount realized by its conversion must be apportioned between capital and income, so that the part representing capital may bear the same proportion to the part representing income, as a fund accumulating at compound interest for the same period (with yearly rests and deducting income tax) would bear to the accumulated interest; accordingly so much of the amount realized as would at compound interest, from

the death of the testator until the day of realization, have produced the amount actually realized, is treated as capital and the balance as income: *Re Chesterfield*, 24 Ch. D. 643 (life policies); *Beavan* v. *Beavan*, 24 Ch. D. 649 n. (mortgage of a reversion); *Re Hobson*, 55 L. J. Ch. 422 (reversionary interest in consols); *Re Morley*, (1895) 2 Ch. 738 (life policies).

The rate of interest allowed in the above cases was 4 per cent., but in consequence of the reduced rate of interest obtainable from trust securities a few years ago, it has recently been laid down that for the future only 3 per cent. should be allowed: *Re Goodenough*, (1895) 2 Ch. 537; *Rowlls* v. *Bebb*, (1900) 2 Ch. 107; see *Re Davy*, (1908) 1 Ch. 61.

The rule has also been applied to accumulated rents of a mortgaged colliery becoming divisible on foreclosure: *Re Godden*, (1893) 1 Ch. 292: see *ante*, p. 129.

The above rule, sometimes called the Rule in *Chesterfield's* case, applies even where the life-tenant of the residue is also entitled to the particular interest on which the reversion is expectant: *Johnson* v. *Routh*, 27 L. J. Ch. 305; *Harrington* v. *Atherton*, 2 D. J. & S. 352; *Napier* v. *Staples*, 10 Ir. Ch. Rep. 344; *Re Hobson*, 55 L. J. Ch. 422; *Re Goodenough*, (1895) 2 Ch. 537; *Rowlls* v. *Bebb*, (1900) 2 Ch. 107.

Outstanding estate.

Outstanding personal estate producing no income, the recovery of which is properly postponed for the benefit of the estate, is apportionable, when got in, in the same way as a deferred interest: see *Re Chesterfield*, 24 Ch. D. 643 (where a debt was recovered with arrears of interest nearly ten years after the death), and see *Beavan* v. *Beavan*, 24 Ch. D. 649 n. (where arrears of an annuity were recovered thirteen years after the death).

Exclusion of rule.

The rule in *Howe* v. *Lord Dartmouth* may be excluded

Chap. X.

in the case of a reversionary interest, in the same way as in the case of wasting property.

Thus, where there is a trust to convert with a discretion as to time of conversion, the rule is excluded by a direction that the actual income of property remaining unconverted shall be paid in the same way as income after conversion: see *Mackie* v. *Mackie*, 5 Ha. 70; *Rowlls* v. *Bebb*, (1900) 2 Ch. 107; and in that case the life-tenant is not entitled to any income in respect of a reversionary interest for the period during which conversion is properly postponed: *Mackie* v. *Mackie*, 5 Ha. 70.

But where there was a discretionary power for the trustees to postpone conversion, with a direction that the yearly produce until conversion should be deemed income, and a reversionary interest was left unconverted by an oversight, under circumstances which would have precluded the trustees (who were the remaindermen) from exercising the power of postponement, the representative of the life-tenant was held entitled to have the income which she lost during her lifetime made good out of the capital of the fund: *Rowlls* v. *Bebb*, (1900) 2 Ch. 107.

A discretion as to time of conversion without any direction as to interim income, does not exclude the rule: *Wilkinson* v. *Duncan*, 23 Beav. 469.

Where there is no trust for conversion, the rule is excluded by a discretionary power of sale: *Re Pitcairn*, (1896) 2 Ch. 199; see *Lane* v. *Brown*, 25 L. T. 152.

A direction that a reversionary interest should form part of the testator's personal estate and be paid to his executors and trustees accordingly, was held to exclude conversion, so that the life-tenant was not entitled to an apportionment in respect of income before it fell in: *Re Flower*, 63 L. T. 201.

So, where a fund set apart by the will was directed to sink into and form part of residue on the happening

of a contingency, the life-tenant was held not entitled to any apportionment on account of intermediate income: *Pigott* v. *Pigott*, (1893) W. N. 115.

Where rule does not apply.

The rule in *Howe* v. *Lord Dartmouth*, seems not to apply in the following cases:—

(1) Where the property and all parties interested are out of the jurisdiction: *Holland* v. *Hughes*, 16 Ves. 111.

(2) In the case of leaseholds situate in a country not governed by English law: *Re Moses*, (1908) 2 Ch. 235.

(3) In the case of terminable and reversionary interests which taken together constitute a permanent income-producing fund. Thus, where the residue comprised both life annuities and policies on the annuitants' lives, securing the capital value of the annuities, and the trustees had a discretionary power of sale, the Court allowed the annuities to be retained and the policies kept up, and gave the life-tenant the surplus of the annuities after payment of the policy premiums: *Glengall* v. *Barnard*, 5 Beav. 245; and (*semble*) as a matter of management, trustees might act in the same way: see *Rowlls* v. *Bebb*, (1900) 2 Ch. at p. 116.

Income where rule excluded.

When the rule in *Howe* v. *Lord Dartmouth*, is excluded, the income payable to the life-tenant includes the same items as in the case of specifically settled property: see Chap. I.

But a provision entitling the life-tenant to enjoy residue in specie does not preclude the trustees from getting in mere debts, such as turnpike bonds (*Holgate* v. *Jennings*, 24 Beav. 623), or mortgage debts left on insufficient securities: *Crowe* v. *Crisford*, 17 Beav. 507.

INDEX.

Accident,
effect on rights, 28

Accumulated Profits,
company, of, 11, 12

Accumulation of Income,
contingent legacies, 135
life-tenant, 17, 136
debts, to pay, 16, 18
defeasible interest, 17
failure of, 17, 18, 135
infancy, during, 17, 136
investment, till, 17, 137
maintenance, 17
residue, falling into, 135
sale, till, 3
surplus, 18, 135
trust for, 3, 16, 135
void trust, 17, 18, 135

Acquiescence, 3, 7, 13

Actuarial Valuation,
renewal fines, 88

Additions to Buildings,
L. C. C. Act, under, 70
Lim. Own. Res. Acts, 74
S. L. Acts, under, 81, 82

Administration Expenses, 96

Advances,
life-tenant's, 89, 118
remainderman's, 121

Advowson, 8

After-acquired Property, 2

Agricultural Holdings Acts,
compensation, 115

Allhusen *v.* Whittell,
rule in, 132

Alterations in Buildings,
L. C. C. Act, under, 70
S. L. Acts, under, 81, 82, 83

Annual Profits, 4

Annuities,
apportionment of, 20, 21, 111
arrears of, 111
charge of, 110, 111, 133
covenant to pay, 111, 133
fund set apart for, 134
insufficient income, 111
interest on arrears, 111
payment by life-tenant, 111
residue, part of, 138, 142, 157
payable out of, 133, 134
settled specifically, 1
unproductive property, 111

Appointment of Trustees,
costs of, 97, 104

Apportionment,
accruing income, of, 21, 23
Act of 1834...19, 65
Act of 1870...20, 65
annuities, 19, 20, 21, 111
arrears of income, 23
bonus, 21, 22
business profits, 22
capital, return of, 21
company's articles, 22
deed of settlement, 22
compositions, 19
copyhold fines, 94
costs, 100
debt and interest, 155
dividends, 19, 20, 21, 22, 23
exclusion of, 20, 22, 24
interest (income), 19, 21
(outgoing), 107
investment, change of, 24, 49, 50
just allowances, 20, 65, 107
losses, 123-130
outgoings, 65
outstanding estate, 155

Apportionment—*continued.*
partnership profits, 22
pensions, 19, 21
periodical payments, 20
policies, 20, 65
rates, 65
remedies, 20
renewal fines, 88–92
rent (income), 19, 20, 21, 23
(outgoing), 65
residue and specific devise, between, 24
reversionary interest, 154
salaries, 21
sale proceeds, 49, 50
stipulation excluding, 20, 22, 24
taxes, 65
time, in respect of, 19–24
tithes, 21
when part recoverable, 20

Arbitration,
costs under L. C. Act, 102

Arrears,
annuity, 111
dividends, 23
interest, 108, 109

Audit Expenses, 96

Authorized Investments,
losses, 126
residue, 136
specific property, 9

Bank Stock,
bonus, 11
residue, part of, 139

Bath, 82

Billiard Room, 82

Bond Debt,
life-tenant, payment by, 118
loss of part, 128
residue, part of, 138

Bonus,
accumulated profits, out of, 11, 13
apportionment of, 21, 22
bank stock, on, 11
capitalizing, 12
compensation, as, 14
current profits, out of, 10, 11
floating capital, out of, 11
Irish Land Act, under, 7
mistake, 14
mortgagor, paid by, 16

Bonus—*continued.*
new shares, by way of, 12
option of dividend, or, 13
policy, on, 16
redeeming rentcharge, on, 117

Breach of Trust,
investment, in, 9, 49, 143
liability for, 133
refunding income, 143

Brickfields,
royalties, 38

Brickmaking, 77

Bridges,
making or improving, 74, 77

Buildings,
Agr. Holdings Act, under, 79
cottages, labourers', 73, 76, 80
covenant to erect, 67
fire insurance, 6, 7, 52
Improvement of Land Act, under, 73
improvements, 66–83
L. C. C. Act, under, 70
Land Drainage Act, under, 72
Limited Owners Act, under, 74
outgoings, trust to pay, 68
repairs, 54–62
ruinous, 67, 69, 70
S. E. Act, under, 71
S. L. Act, under, 76–83
trust to invest in land, 69
trustees' powers, 66
unfinished, completing, 67, 68
useless, 70
voluntary expenditure, 66
working classes, 78

Building Land,
improvement of, 77
unproductive, 3, 123

Business,
apportionment of profits, 22
continued under order, 141
increase in value of, 16
losses, 124
plant, keeping up, 16
power to carry on, 149
to leave capital in, 148
to postpone sale, 146
profits of capital in, 16, 148
residue, part of, 138, 141, 147, 149
settled specifically, 15
stock, keeping up, 16
unauthorized investment, income of, 10, 138, 141, 147
loss in, 124, 125

Calls on Shares, 121

Canals,
making, 72, 73

Canal Shares,
residue, part of, 138

Cash,
residue, part of, 145

Chapel, 79

Charge,
annuities, of, 110
building, for, 72, 73
compensation to tenants, for, 116
cost of enforcing, 100
establishing, 99
debts, of, 107
discretion as to raising, 114
drainage, for, 72, 73
embankment, for, 72, 73
enfranchisement, for, 95
improvements, for, 72, 73
insufficient income, 108
interest on, 107, 109
irrigation, for, 72, 73
legacies, of, 110
Licensing Act, under, 51
payment by life-tenant, 118
remainderman, 121
renewal, for, 89
successive life-tenants, 109, 119
terminable, 116
trust to raise, 112
warping, for, 72, 73
will, by, 107

Chattels,
consumables, 8, 138
covenant to settle, 2
residue, part of, 138
settled specifically, 8
use of, 8

Chesterfield's Case, Rule, 154

Clay Pits,
working, 36, 38

Clearing Land, 73, 76

Commission,
letting, on, 104

Company,
accumulated profits of, 11–13
amalgamation, 15
bonus of, 10–13
capital, payment off, 13

Company—*continued.*
capitalizing profits, 12
current profits, 10, 11
directors' fees, 15
dividends, 10–13
floating capital, 11
increase of capital, 11, 12, 14
new shares, 12, 13, 14
option of dividend, 13
power to increase capital, 12
profits of, 10–13
reduction of capital, 13
reserve fund, 13, 15, 49
shares, 10–14, 49, 147, 149
stock, 10
surplus assets, 14
winding-up, 15

Compensation,
Agr. Holdings Acts, 115, 116
breach of covenant, 5
compulsory sale, 43–46
minerals unworked, 46
tenant's improvements, 116
tenant-right, 115
trespassers, 41
waiver of restrictions, 5
withdrawing opposition, 44

Compound Interest,
losses, 126
reversionary interests, 154

Compulsory Sale,
compensation, 43–46

Compulsory Works,
dangerous structure, 56, 57, 71
drainage works, 62–64
paving and sewering, 64
payment by life-tenant, 118
private street expenses, 65

Conduits,
making, 74, 77

Consols Rule,
residue, income of, 140
trust for sale,
interim income, 4

Consumables,
residue, part of, 138, 145
settled specifically, 8, 9

Contingent Devise,
interim rents, 1

Contingent Liabilities,
annuities, 135
debts, 133
legacies, 135

Contingent Life-Tenant,
residue, of, 136
specific property, of, 17

Conversion of Residue,
annuities, 138, 142, 145
bank stock, 139
bond debts, 138
business, 138, 141, 147, 149
canal shares, 138
cash, 145
consumables, 138, 145
debentures, 151
delay, 3
direction against, 148
discretion, trustees', 146, 156
East India stock, 139
excepted property, 145
farming stock, 145
foreign bonds, 138
furniture, 138, 152
interim income, 140–148, 155
leaseholds, 138, 142–153
mixed residue, 153
notional, time for, 139
outstanding estate, 155
partial, direction for, 144
partnership share, 138, 147, 149
permanent property, 148
power of sale, 146, 149, 150, 156
to postpone, 146, 148, 156
to retain, 147, 148
to vary, 150
railway shares, 138
real securities, 139
reversionary interests, 154–157
rule explained, 137
shares in companies, 139, 141, 147, 148
ships, 147, 148, 149
specific mention, 151, 152
stocks, 141
terminable annuities, 138, 142, 145
time fixed for, 145, 146
for notional, 139
trust for, 144–147, 156
where none, 148–150, 156
unauthorized investments, 138–143
wasting property, 137, 142, 146
waterworks shares, 139, 147
whole income, gift of, 150

Copyholds,
enfranchisement, cost of, 95
expenses, 102
money, 44, 48
fines (income), 8
(outgoings), 93, 94
purchase of, 95
repairs to, 56
sale proceeds, 42

Corn, 8

Costs and Expenses,
action, 99–101, 104
administration, 96
administration suit, 99
apportionment, 100
arbitration under L. C. C. Act, 102
audit, 96
charge, enforcing, 100
establishing, 99
enfranchisement, 95, 102
estate agent, 104
estate duty account, 96
executing trusts, 96
foreclosure, 100
inclosure, 102
incumbrancer's concurrence, 104
incumbrances, raising, 104
investment, 97, 99
change of, 98, 103
L. C. C. Act, under, 102
letting, 104
life-tenant's proceedings, 98, 101
notice to repair, 97
official solicitor's, 103
parliament, application to, 101
opposition to, 101, 103
payment into court, 98
out of dividends, 98, 99
possession, obtaining, 98
proceedings, 100, 101
protection of estate, 101
public trustee, 96
purchase of copyhold, 102
raising, 104
receiver, 97
redemption suit, 100
reference as to capacity, 99
renewal, incidence of, 100
repair notices, 99
rights, declaring, 99, 100
sale, abortive, 104

Costs and Expenses—*contd.*
sale under L. C. Act, 102, 103
S. L. Acts, 104
scheme, 104
S. E. Act, under, 100
S. L. Act, under, 100, 103
settlement of ward, 98
special case, 100
stock taking, 96
succession duty account, 96
survey for repairs, 97
survey, unnecessary, 103
transfer, 104
trustees' appearance, 98
appointment, 97
proceedings, 101
provision for, 96
suit for discharge, 98
Trustee Act, under, 98
valuation, unnecessary, 104
vesting order, 97
wrong fund, out of, 105

Cottages,
erection of labourers', 73, 76, 80

Covenant,
annuity, 111, 133
damages for breach, 5
loss under, 128
settle, to, 2
settlor's, 67, 89
trust to perform, 64

Cum Div. Sale,
apportionment, 50

Dams,
making, 74, 77

Damages,
for breach of covenant, 5

Dangerous Structure, 56, 57, 71

Death Duties, 58
interest on, 112

Debts,
accumulation to pay, 18
charge of, 18, 107
interest on, 106
residue, part of, 155, 157
payment out of, 132
trust to pay, 18, 112, 114
to raise, 113, 114

Deed,
settlement by, 2

Deer, 9

Delay,
ascertaining profits, 23
claim against life-tenant, 108
claiming charge, 121
conversion, 3, 43
consent to, 3

Deposit on Sale, 42

Dilapidations,
at date of settlement, 55
at testator's death, 57, 58

Directors' Fees, 15

Discretion, Trustees',
conversion, 146
costs, incidence of, 96
improvements, 69, 85
incumbrances, raising, 114
management, power of, 69
outlay, 59
postponing sale, 146, 148, 156
power of sale, 146, 156
raising charge, 114
renewal, 2, 92
repairs, 59
sale, time of, 146, 156
S. L. Act works, 85
wasting property, 146

Dividends,
accumulated profits, out of, 12
apportionment of, 19, 21–23
arrears of, 23
current profits, out of, 10

Docks,
constructing, 69, 77

Drainage,
agricultural purposes, for, 72, 73, 76, 79
Agricultural Holdings Acts, under, 79
alterations, 80, 83
building purposes, for, 71
compulsory, 63, 64
construction, 71–73, 76, 79
improvement, 64, 80
Improvement of Land Act, 73
infancy, during life-tenant's, 67
Land Drainage Act, 72
Metr. Management Act, 62, 64
mines, 81
Public Health Act, 63, 64
Public Money Drain. Act, 72
reconstruction, 63, 64
repair, 61, 62

Drainage—*continued.*
S. E. Act, 71
S. L. Acts, 64, 76, 79, 80
sewage supply, for, 76
trust for sale, 63, 64
to invest in land, 69
to pay outgoings, 64
to perform covenants, 64
to repair, 63
voluntary, 66

Dry Rot,
floor, 82
rebuilding, 68, 83
repairs, 55

Dwellings for Working Classes, 78

East India Stock,
residue, part of, 139

Electric Light Installation, 83

Embankments,
making, 72, 73, 76
repair, 61

Enfranchisement,
compensation for, 44, 48
copyholds, cost of, 95, 102
fines on, 8
leaseholds, cost of, 93
raising money for, 95

Engine House,
construction, 77, 83

Entrance to House,
alteration, 82

Equitable Waste, 32
limitations, 36

Estate Agent's House,
building, 80

Estate Duty, 112

Estate Duty Account, 96

Expenses, 96–104. *See* Costs

Extras,
scheme under S. L. Acts, 84

Farm Houses and Buildings,
erection, 73, 76, 80
insurance, 53

Farm Roads,
making, 73

Farming Stock, 9, 145

Fee Farm Rents (outgoings), 51

Fences,
making, 69, 71, 77, 79, 80
removing, 79
straightening, 73, 76

Fields,
redivision of, 73, 76

Fines,
copyhold (income), 8
(outgoings), 93, 94
security for, 94
trust to raise, 94
leases, on, 5
renewal (income), 5
(outgoings), 88

Fire Hydrants, 81

Fire Insurance. *See* Insurance
policy money, 6, 7
premiums, 52–54

Fixtures,
sale proceeds, 47

Floating Capital,
bonus out of, 11

Floodgates,
construction of, 74

Floor,
dry rot, 82

Foreclosure,
rents before, 127, 147

Foreign Bonds,
residue, part of, 138

Freestone,
improvements, for, 38

Fruit, 4

Fruit Bushes and Trees,
planting, 79

Fund,
loss of, 130

Funeral Expenses,
payment out of residue, 132

Furniture,
insurance of, 53
residue, part of, 138, 152
settled specifically, 8

Garden,
keeping up, 62
making, 71, 77, 79
walls, 80

Gas Stock,
residue, part of, 138

Glass Houses, 82

Grass, 4

Gravel, 37

Ground Rents,
sale proceeds, 45, 48

Groynes,
making, 76

Hatches,
construction of, 74

Heating Apparatus,
supply of, 83

Heirlooms,
insurance, 7
sale proceeds, 45, 48

Heriots,
renewal, 5

Hops,
planting, 79
wirework for, 79

Hot Water Pipes, 81, 82

Houses,
building, 66
estate agent's, 80
finishing, 68
rebuilding, 67
S. L. Act, within, 79

Howe *v.* **Ld. Dartmouth, Rule,**
annuities, 138, 157
bank stock, 139
bonds, 138
business, 138
cash, 145
consols standard, 140
consumables, 138
construction, question of, 144
debts, 155, 157
deed, settlement by, 2
direction not to sell, 148
exclusion of rule, 152, 157
partial, 144
extent of rule, 138
furniture, 138
intention, 144
leaseholds, 138
live stock, 138
mixed residue, 3, 153
mortgage, 139
onus of showing intention, 144
out of jurisdiction, 157
outstanding estate, 155

Howe *v.* **Ld. Dartmouth, Rule**—*continued.*
partnership share, 138, 149
policies, 155, 157
power of sale, 146, 149, 150, 156, 157
to carry on business, 149
to retain, 148, 149
to vary, 150
real securities, 139
rents, mention of, 153
reversionary interests, 154
settlement by deed, 2
specific bequest, 2
mention, 151
stocks and shares, 138, 139
tendency of cases, 144
trust for sale, 144–147
at death of l.-t., 145
discretion as to time, 146, 156
excepted property, 145
interim income given, 146, 147
power to postpone, 146, 156
to retain, 147
trustees' powers, 157
unauthorized investments, 138, 139
wasting property, 137
where no trust for sale, 148–150
whole income, gift of, 150

Impeachment of Waste,
exemption from, 25, 31
minerals, in case of, 39, 40
presumption as to, 25
timber, in case of, 25

Improvements,
additions and alterations, 70, 77, 81, 82, 83
Agr. Holdings Act, 78, 79
bath, 82
billiard room, 82
brickmaking, 77
bridges, 74, 77, 79
building, 67, 68–73, 79
building land, 77
canals, 73, 77
capital money, none in hand, 86
certificate, 85
chapels, 79
charge for, 86
clearing land, 73, 76

Improvements—*continued.*
compensation for, 115, 116
compulsory works, 62
conduits, 74, 77
conflict of powers, 83
cottages, 73, 76, 80
court, discretion, 86
jurisdiction, 67
dams, 74, 77
dangerous structure, 71
discretion, trustees', 69, 85
dividing fields, 73, 76
docks, 77
drainage, 66, 67, 69, 72, 73, 76, 79, 80, 83
drains, 62, 71, 76, 77
dwellings, working classes, 78
electric light, 81, 83
embankments, 72, 73, 76, 79
engine-houses, 74, 77, 81, 83
entrance, 82
estate agent's house, 80
extras, S. L. Act scheme, 84
farm buildings, 73, 76, 80
houses, 73, 76
roads, 73, 76
fencing, 69, 71, 73, 76, 77, 79, 80
fire hydrants, 81
floodgates, 74
floor, 82
fruit bushes and trees, 79
gardener's cottage, 80
gardens, 62, 71, 77, 79
garden walls, 80
glass houses, 82
groynes, 76
hatches, 74
heating apparatus, 83
hops, 79
hot-water supply, 81, 82
houses, 67, 68, 79, 80
Housing of Working Classes Act, 78
Improvement of Land Act, 73, 75
inclosing, 73, 76, 80
infancy of life-tenant, 67
insurance, 53, 54
irrigation, 72, 73, 76, 79
jetties, 74, 77
jurisdiction, 67, 79
kilns, 74, 77
labourers' cottages, 73, 76, 80
Land Drainage Act, 72
landing places, 74, 77
L. C. C. Act, under, 70
laundry, 83
leads, 74

Improvements—*continued.*
Limited Owners Reservoir and Water Supply Act, 75
Limited Owners Residences Act, 74
machinery for sewage supply, 26
machinery for water supply, 77
management, power of, 69, 84
mansion-house, 66, 74, 78, 83
markets, 77
mills, 74, 76, 80, 83
minerals for, 38
mines, 77, 81
necessary, 67
open spaces, 62, 71, 77
orchards, 79
osier beds, 79
pasture, 79
paths, 62, 71, 77
paving, 64, 71, 77
peach house, 82
personalty fund, 67
piers, 77
pipe-making, 77
pipes, 74, 76, 77, 81
pits for mines, 77
planting, 74, 76, 79
ponds, 74, 77, 79
power, trustees', to make, 66, 69
powers, conflict of, 83
privy, 82
prospective order, 85
public house bar, 82
Public Money Drain. Act, 72
pulling down, 80
pumps for mines, 81
railways, 73, 77
raising by charge, 73, 75
rebuilding, 67, 69, 80, 81, 83
reclaiming land, 73, 76, 79
reconstruction, 77, 81, 83
remunerative, 80
rentcharge for, 72, 73, 75
repair of, 26, 38, 61, 62
reservoirs, 74, 75, 77, 79
roads, 62, 71, 73, 76, 77, 79
roofing, 70, 81, 82
salvage, 67, 68
saw-mills, 74, 76
scheme under S. L. Acts, 84, 85
scutch-mills, 76
sea walls, 76
S. E. Acts, under, 62, 71
S. L. Acts, under, 76–87
several estates, 87

Improvements—*continued.*
sewers, 62, 77
shafts, 74, 77
silos, 79, 80
sluices, 74, 77, 79
squares, 62, 71, 77
stables, 79, 80, 82, 83
streams, 73, 76
streets, 62, 76, 77
tanks, 74, 77
tenants', 116
tile making, 77
timber for, 26
tramways, 73, 77
trenching, 76
trifling, 85
trust to invest in land, 69
to pay outgoings, 68, 84
to repair, 68
trustees, by, 69
unauthorized, 66
unfinished buildings, 68
vinery, 82
voluntary, 66
walls, 80
warping, 72, 73, 76, 79
washhouses, 82
watercourses, 62, 73, 74, 76, 77, 79
water power, 79
supply, 74, 79, 81
wheels, 74, 76
weirs, 73, 74, 76, 77
wells, 74, 77, 79
wirework for hops, 79
working class dwellings, 78

Inclosure Expenses, 73, 76, 80, 102

Increase in Value,
investments, of, 49
partnership capital, 15
shares, 49
stock-in-trade, 16

Incumbrances,
accumulation to pay, 16, 18
annuities, 110
arrears, 108, 109
bond debts, not, 118
cost of enforcing, 100
raising, 104
death duties, 111, 112
debts, charge of, 107
direction for l.-t. to pay, 114
estate duty, 112
exoneration of capital, 112–114
insufficient income, 108, 109

Incumbrances—*continued.*
interest, failure to pay, 107
keeping down, 106, 118
leaseholds, on, 106
legacies, charge of, 110
legacy duty, 111
life-tenant's liability, 107, 108, 110
limitations, 108
maintenance, 108
merger of, 119, 120
mortgagee in possession, 110
payment by life-tenant, 118–120
power, created under, 107
raising by mortgage, 112, 118
sale, 108
receiver, 108
redemption of, 115
rule as to, 106
set off, 108, 110
S. L. Acts provisions, 115, 117
settlement estate duty, 112
settlor's liability, effect of, 111
several estates, 110
succession duty, 111
successive life-tenants, 109, 119
surplus income, 110
tenant-right, 115
terminable charges, 116–118
transfer to life-tenant, 107
trust to pay, 114
raise, 112, 113
trustees' discretion, 114
powers, 113
unproductive estate, 107
wasting security, 106
will, charge by, 107

India Stock, 139

Infant Life-Tenant,
accumulations, 17
maintenance, 17

Insufficient Income, 108

Insufficient Security, 157

Insurance,
copyholds, 52
freeholds, 52
furniture, 53
heirlooms, 7
improvements, 53, 54
leaseholds, 52
mansion-house, 53
policy money, 6, 7
premiums, 52–54

Insurance—*continued.*
trustees' powers, 53
unproductive property, 52

Interest,
annuity arrears, 111
apportionment,
income, 19, 21
investment, on, 49
outgoing, 107
arrears, 108, 109
death duties, 112
deferred, 5
insufficient income, 108
keeping down, 108–110
legacies, on, 110, 134
loss of, 123, 124, 126
lump sum, 5, 21
mortgage (income), 5
mortgagee in possession, 110
notice, in lieu of, 16
partnership, 19
personal liability, 108
purchase money, on, 5
rate of, reduced, 142, 155
receiver for, 108
residue, unconverted, 139-142
renewal advance, 89
sale to raise, 108
set-off, 110
several mortgages, 110
successive life-tenants, 109
unauthorized investments, 10, 139
will, charge under, 107

Investment,
application for advice, 97
apportionment on change, 24, 49
authorized, income of, 9
residue, 136
breach of trust. 9, 143
costs of, 97, 99, 103
depreciation, 130
increase in value of, 49
losses, 123–131
power to retain, 147, 148
refunding income, 9, 130, 143
unauthorized, income of, 9, 139
business, 110

Irish Land Act,
bonus, 7

Irrigation Expenses, 72, 73, 76, 79

Jetties,
making, 74, 77

Judicature Act,
equitable waste, 32
permissive waste, 54
repairs, condition, 59

Kilns,
making, 74, 77

Lake Cleaning, 62

Land,
rents, 1, 3
residuary devise, 1, 3
trust for sale, 3
to invest in, 17
unproductive, 3, 123

Landing Places,
making, 74, 77

Lands Clauses Act,
additions and alterations, 70
building, application in, 70
compensation under, 43–46
costs under, 102
ground rents, 45
improvements, application in, 70, 71
interest stipulated for, 5
leaseholds, 44, 45
minerals, 44, 46
past expenditure, 71
rebuilding, application in, 70, 71
recouping past expenditure, 71
repairs, application in, 60
reversions, 44
sale proceeds, 43–46
S. L. Act extension, 71
special injury, 44
water supply, 70

Laundry, 83

Leads,
making, 74

Leaseholds,
conversion of, 2, 3, 138
covenant to settle, 2
dilapidations at death, 55, 57, 58
drainage works, 64
fines, 5
incumbrance, 106
renewal, 2, 88–93
impossible, 2, 43, 47
rents, 1
repairs, 57, 58
residue, part of, 138, 142, 145, 146, 148, 153

Leaseholds—*continued.*
sale proceeds, 42, 136
L. C. C. Act, under, 44
Partition Act, under, 46
S. E. Act, under, 46
S. L. Act, under, 47
settled specifically, 1, 2
surrender, 6
trust for sale of, 3
unproductive, 42
unsaleable, 142

Legacies,
accumulation of income, 135
charge of, 110
future, 135
insufficient estate, 127
interest, 110, 134
investments set apart, 9
residue, payable out of, 132, 135
trust to raise, 113

Legacy Duty, 111

Letting,
commission, 104

Licensing Charge, 51

Limestone,
improvements, for, 38

Limitations,
charge paid by life-tenant, 121
interest, arrears of, 108
timber cut wrongfully, 36

Losses,
annuity fund, 128
apportionment of, 123, 130
authorized investment, 126, 127
benefit of estate, 125
bond debt, 123, 128
breach of trust, 123, 129, 131
business, 124, 125
capital, 130
circus, 125
colliery mortgage, 129
compound interest, 126
Court, under order of, 123
covenant, breach of, 128
depreciation, 130
income, 123
interest 'as earned,' 124
secured, 126
unsecured, 123
investment, 123–131
leaseholds, 125

Losses—*continued.*
legacy, insufficient estate, 127
mistake, through, 124
mortgage, insufficient, 126, 127, 129
net income clause, 126
partnership, 124
part realization, 130
rate of interest, 127–129
receiver, by, 125
reduced annuities, 124
refunding income, 130, 131
rents misapplied, 123
residue, 125, 128, 129
ships, 125
successive life-tenants, 127
trustees' defalcations, 123
unauthorized investment, 128
unproductive land, 123, 125

Machinery,
sewage supply, for, 76
water supply, for, 77

Maintenance,
accumulation, 17
insufficient income, 108

Management,
power of, 69, 84

Manor,
income of, 8

Mansion-House,
addition to, 74
drainage, 80
finishing, 67
improvement, 69, 74
insurance, 53
rebuilding, 67, 68, 83
repair, 54, 83
trust to invest in land, 69
water supply, 81

Manure,
drains and pipes for supply, 76
sale proceeds, 47

Markets,
making, 77

Merger,
life-tenant's charge, of, 119, 120
limitations, 121

Mills,
making, 74, 76, 80

Mines and Minerals,
abandoned, 37
clay pits, 36

Mines and Minerals—*contd.*
compensation, trespassers', 41
compulsory taking, 44, 46
draining, 81
gravel pits, 37
impeachment of waste, 36–40
without, 40–41
improper working, 40
improvement, 77
improvements, for, 36, 38
keeping up, 62
lease under power, 39
settlor, by, 39
S. E. Act, under, 38, 40
S. L. Act, under, 38, 40
life-tenant's rights, 36
new pits and seams, 37
open mines and quarries, 36, 37, 39
power to work, 37
rents and royalties, 38–40
repairs, 36
sale under L. C. C. Act, 44, 46
with estate, 41
specific mention, 36
stone quarries, 36, 37
trespassers' compensation, 41
trial pits, 77
trust for sale, 38–40
unopened, 36, 37, 39
wrongful working, 40

Mistake,
bonus retained as capital, 14
charge merged by, 120
costs out of wrong fund, 105
Court, by, 14
income lost by, 124
treated as capital, 14
wasting property retained by, 142

Mixed Fund,
income of, 3, 133, 153

Mortgage. *See* INCUMBRANCES
accumulation to pay, 16, 18
bonus on, 16
charged on income, 18
cost of, 104
depreciation, 130
direction for l.-t. to pay, 114
insufficient security, 126
interest, apportionment of, 19
(income), 5
(outgoing), 106
interest in lieu of notice, 16
possession taken, where, 110, 127, 147

Net Income Clause, 4, 5, 147

Notice to Repair,
cost of, 97

Official Solicitor,
costs of, 103

Open Spaces,
maintaining, 62
making, 71, 77

Option,
dividends or shares, 13
new shares, 14
policy bonus, 16
purchase, of, 47

Orchards,
planting, 79

Ornamental Timber, 32

Osier Beds,
planting, 79

Outgoings,
apportionment, 65
condition to pay, 58
dangerous structure, 56, 57
drainage, 62–64
fee farm rents, 51
fire insurance, 52–54
licensing charge, 51
paving expenses, 64
private street expenses, 65
quit rents, 51
rates and taxes, 51
rents of leaseholds, 52
repairs, 54–62
residue, 134
settlor's liability, 65
trust to pay, 59, 64, 68, 84
unproductive property, 51, 52, 57

Outstanding Estate,
residue, part of, 155

Overpayment,
income, of, 143

Parliament,
application to, costs of, 101
opposition, 101

Partition Act,
sale proceeds, 46

Partnership Share,
apportionment of profits, 22
articles, effect of, 15
capitalizing profits, 15
increase in value, 15
interest on, apportioned, 19

Partnership Share—*continued.*
losses, 124
power to continue, 147
to postpone sale, 147
practice of firm, 15
profits, 15
residue, part of, 138, 145, 147, 149
unsaleable, 141

Pasture,
laying down, 79

Paths,
making, 71, 77
repair of, 62

Paving Expenses, 64, 65, 71, 77

Payment into Court,
costs of, 98

Payment out,
costs of, 98

Payment of Charge,
life-tenant, by, 118–120
rents, out of, 110, 118

Peach House, 82

Permissive Waste, 54

Personalty Fund,
improvements out of, 67

Piers,
making, 77

Pigeons, 9

Pipes,
hot water, 81, 83
sewage, 76
water, 77

Pits,
trial, for mines, 77

Plant,
keeping up, 16

Planting, 74, 76, 79

Policy,
apportionment, 20, 65
bonus, 16
insurance money, 67
premiums (fire), 52
(life), 121
residue, part of, 155, 157

Ponds,
making, 74, 77, 79

Portions,
fund, income of, 4, 135
trust to raise, 113

Possession,
costs of obtaining, 98

Power,
conflict with S. L. Act, 83
improvements, to make, 66, 69
management, 69
postponing sale, 146, 156
renewing leases, 2
repairs, making, 59
retaining investments, 147, 148
sale of residue, 146, 149, 150, 156
varying securities, 1, 150

Premiums,
fire insurance, 52
life assurance, 121

Presentation, Right of, 8

Private Street Expenses, 65

Proceeds of Sale, 42–50. *See* SALE

Proceedings,
costs of, 100, 101

Profits,
annual, 4
bonus, 7, 10–14
breach of trust, 9
business, of, 15
casual, 4
partnership, of, 15
settled by reference, 16
shares and stock, of, 10–14

Public House,
licensing charge, 51

Public Trustee,
expense, 96

Pulling Down,
to rebuild, 67, 70, 80

Pumps and Pumping Engines, 81

Purchase Money,
interest, 5

Quarries, 36, 37

Quit Rents (outgoings), 51

Railways,
making, 73, 77

Railway Shares,
residue, part of, 138

Raising,
copyhold fines, 94
costs, 104
enfranchisement, 95
incumbrances, 112
renewal fines, 90, 92

Rates,
apportionment of, 65
incidence of, 51

Real Estate,
contingent devise, 1
mixed, 3, 153
residue, 1, 3, 133, 153
settled specifically, 1
trust for sale, 3
unproductive, 3, 123

Real Securities,
residue, part of, 139

Rebuilding,
alterations, 83
dangerous structure, 71
dry rot, 68, 83
fire, in case of, 58
increased rental, for, 67
L. C. C. Act, under, 70
mansion-house, 67, 78, 83
pulling down for, 67, 70, 80
repair, condition for, 58, 68
trust for, 59, 68
S. L. Acts, under, 78, 83
stables, 83
trust to invest in land, 69
uninsurable buildings, 70

Receiver,
costs of, 97
interest not kept down, 108
losses by, 125
renewal, failure of, 92
timber cut improperly, 35

Reclaiming Land, 73, 76, 79

Reconstruction, 77, 81

Redemption Suit,
cost of, 100

Reduced Stock, 124

Reference,
trust by, 16

Refunding Income, 130, 131, 143

Renewable Leaseholds,
conversion of, 2
fines, incidence of, 88-93
power to renew, 2

Renewable Leaseholds—*contd.*
renewal impossible, 2, 19, 43, 47
rents, 2
reversion, purchase of, 93
sale, proceeds of,
L. C. C. Act, under, 44-46
S. E. Act, under, 47
settled specifically, 2
trust for renewal, 2, 43, 47

Renewal,
actuarial valuation, 88
advance by life-tenant, 89
apportionment of fines, 88, 91
benefit of, 89
capital, out of, 92
charge for advance, 89
condition to keep up, 92
costs of apportionment, 100
covenant, settlor's, for, 89
discretion, trustees', 91
failure to renew, 92, 93
fines (income), 5
fines and expenses, 88
fund, 19
heriots (income), 5
impossible, 2, 19, 43, 47
interest on advance, 90
leaseholds for lives, 88
leaseholds for years, 88
life-tenant, *cestui que vie*, 89
overriding trust for, 2, 19, 47, 91
power to renew, 2, 91, 92
purchase of reversion, 93
raising fines by mortgage, 90
receiver, 90, 92
remainderman not benefited, 89
rents, out of, 91
security for, 89, 90
trust for sale, 92
to raise fines, 91, 92
to renew, 2, 19, 43, 47, 92
trustees' defalcations, 123
failure to renew, 92
power of, 92
valuation, 88, 89

Rentcharge,
improvements, for, 72, 73, 116
redemption, 48, 117

Rents,
apportionment (income), 19, 21, 23
(outgoing), 65

Rents—*continued.*
direction to pay debts till discharged, 114
income, 4
in advance, 4, 23
leaseholds, part of residue, 138, 142, 146, 148, 153
settled specifically, 1, 2
mines, 38-40
mortgage, 127, 147
outgoings, 51, 52
trust to raise out of, 91, 113

Repairs,
apportionment, 56
charge for, 55
condition to repair, 58, 68
copyholds, 56
court, by order of, 56
dangerous structure, 56, 57
dilapidations before settlement, 55
at testator's death, 55, 57, 58
drains, 61
drainage work, 62-64
dry rot, necessitated by, 55
embankments, 61
fire, rebuilding on, 58
forfeiture, 57
freeholds, 54, 56
Improvement of Land Act, 61
improvements, 61, 62
irrigation works, 61
lake, 62
L. C. C. Act, under, 60
Land Drainage Act, under, 61
leaseholds, 57, 58
life-tenant's liability, 54-59
statutory liability, 61, 62
management trust, 56, 59
mansion-house, 53, 83
necessary, 56, 60
notice, cost of, 97
ordinary, 54-59
outgoings, condition, 58
paths, 62
permanent, 55, 61
permissive waste, 55
power to make outlay, 59
Public Money Drainage Act, under, 61
purchased property, 60
rebuilding, 59
residue, 57
roads, 62

Repairs—*continued.*
salvage, 56, 60
sanitary notice, 57
S. E. Act, under, 60, 62
S. L. Acts, under, 61, 62
settlor's liability, 58
sewers, 62
squares, 62
streets, 62
strict settlement, 60
substantial, 56
timber for, 26
trust for sale, 56
to invest in land, 60
to pay outgoings, 59
to repair, 59, 63, 68
trustees' discretion, 59
duty, 56, 57
unproductive property, 57
voluntary, 55
watercourses, 61, 62

Reserve Fund,
capitalizing profits, 13
dissolution, on, 15, 49

Reservoirs,
making, 74, 75, 77, 79

Residue,
accumulations of income, 135, 136
investment, till, 137
annuities, part of, 138, 142
payable out of, 133, 134
annuity fund, 135
authorized investments, 136
bank stock, 139
bond debt, 138
breach of trust liability, 133
business, 138, 141
canal shares, 138
cash, 145
consol interest, 140
contingent annuities, 135
debts, 133
devise, 1
legacies, 135
life-tenant, 136
conversion, 137
debts, 155, 157
direction not to sell, 148
East India stock, 139
fall into, direction to, 135, 156
farming stock, 138, 145
first year's income, 132
foreign bonds, 138
funeral expenses, 132
furniture, 138, 152

Residue—*continued.*
income from death, 136, 139, 140
interest on legacies, 134
leaseholds, 138, 142, 145, 146, 153
legacies, payable out of, 132, 135
loss of, 128, 129
mistake, retained by, 142
mixed fund, 3, 133, 153
mortgage income, 139
outgoings, 134
outstanding estate, 155
partnership share, 138
personal estate, 1, 132
policies (life), 155, 157
portions fund, 135
power of sale, 146, 149, 150, 156
railway shares, 138
real estate, 1, 3, 133, 153
real securities, 139
refunding overpayments, 143
repairs, 57
reversionary interests, 154
rule in *Allhusen* v. *Whittell*, 132
rule in *Chesterfield's* case, 154
rule in *Howe* v. *Ld. Dartmouth*, 137
shares and stock, 138
ships, 141, 147, 148, 149
testamentary expenses, 132
trust to invest in land, 136
to sell, 144–147
unauthorized investments, 137, 139, 141, 143
unproductive property, 155
unsaleable property, 141, 142
wasting property, 137, 142, 147, 148
waterworks shares, 139

Restrictive Conditions,
compensation for waiver, 5

Reversion,
purchase, 93
sale proceeds,
L. C. C. Act, under, 44, 45
S. E. Act, under, 47
S. L. Act, under, 47, 48

Reversionary Interests,
costs of apportionment, 101
covenant to settle, 2
residue, part of, 154

Roads,
making, 71, 77
repairs, 62

Roofing, 70, 80, 82

Royalties,
brickfields, 38
mines, 38–40

Rule in Allhusen *v.* Whittell, 132

Rule in Chesterfield's Case, 154

Rule in Howe *v.* Ld. Dartmouth, 137

Sale,
apportionment of proceeds, 49, 50
copyholds, 42
costs under S. L. Acts, 104
deposit on, 42
freeholds, 42
ground rents, 48
heirlooms, 48
L. C. C. Act, under, 43–46
leaseholds, 42, 44–47
minerals, 36, 40, 44, 46
power of, 146, 149, 150, 156
reversions, 48
S. E. Act, under, 46, 47
S. L. Act, under, 47, 48
shares and stock, 49
trust for. *See* TRUST FOR SALE

Salvage, 41, 44, 50
house falling down, 67
unfinished, 67, 68
repairs, 56, 60

Sand,
improvements, for, 38

Sanitary Notice, 57

Saw-mills,
making, 74, 76

Scheme under S. L. Acts,
capital money in hand, 86
cost of, 104
dispensed with, when, 84, 85
extras, 84
required, when, 84

Scutch-mills,
making, 76

Sea Walls,
making, 76

Set-off,
improvements, against timber, 35
interest against charge, 108
rent, 110

Settled Estates Act,
building under, 71
costs under, 100
drainage, 72
embankment, 72
enfranchisement costs, 95
mineral lease under, 36, 40
paving and sewering, 71
repairs under, 61, 62
sale proceeds, 46, 47
S. L. Act extension, 72

Settled Land Acts,
building under, 76, 83
capital money in hand, 86
certificate required, 85
code, 79
compulsory drainage, 64
conflict of powers, 83, 84
costs under, 103
discretion, 85
enfranchisement under, 95
extras, 84
fine on lease, 5
improvements under, 76
letting commission, 104
mineral lease under, 38, 39, 40
prospective order, 86
reconstruction, 81
redemption of mortgages, 115
rentcharges, 117
repairs of improvements, 61, 62
sale proceeds, 47, 48
scheme under, 84
small works, 85
surrender money, 6

Settlement,
costs of ward's, 98

Settlement Estate Duty, 112

Settlor's Liability,
covenants, 58, 67, 89, 133
outgoings, 65

Several Estates,
improvements, 87
incumbrances, 110

Sewage,
drains, pipes, & machinery, 76

Sewering Expenses, 64, 71

Sewers,
making, 64, 71, 77
repair of, 61

Shafts,
making, 74, 77

Shares and Stock,
accumulated profits, of, 11–14
bonus, 10–13
calls, 121
capital paid off, 13
current profits, 10
directors' fees, 15
dividends, 10
increase in value, 49
mistake as to bonus, 14
new, 11–14
option of new, 13, 14
residue, part of, 138, 139, 141, 147
sale proceeds, 49
cum div., 50
trust for sale, 3

Ships,
direction not to sell, 148
power to postpone sale, 147
retain, 141, 149
retained for benefit of estate, 141

Silos, 79, 80

Sinking Fund, 16

Sluices,
making, 74, 77, 79

Specific Bequest, 2

Specific Property,
settlement of, 1

Squares,
making, 71, 77
repair, 62

Stables,
improvements, 79, 80, 82
rebuilding, 83

Stock. *See* SHARES
reduced annuities, 124

Stock-in-Trade, 9
increase in value, 16
keeping up, 16

Stocktaking Expenses, 96

Streams,
improving, 73, 76

Streets,
making, 76, 77
repair, 62

Succession Account Costs, 96

Succession Duty, 111, 112

Successive Life-Tenants,
incumbrances, 109, 119
losses, 127

Surplus Assets of Company, 14

Surrender,
money paid for, 6

Survey Costs, 97

Tanks, 74, 77

Taxes,
apportionment, 65
incidence, 51

Tenant Right, 115

Terminable Charges,
redemption, 117
S. L. Act provisions, 117
charges not within, 118

Testamentary Expenses, 132

Tile Making, 77

Timber,
ash, beech, birch, 25
blown down, 27, 28, 31
botes, 26
collusion, cutting by, 28, 34
court, cutting by, 29, 30, 31, 34
sanction of, 30
custom, local, 26
dead trees, 25
decaying, 25, 30, 32
delay in proceedings, 36
elm, 25
equitable waste, 32, 36
excepted, 34
impeachment of waste, 25–30
without, 31–35
improper cutting, 28, 29, 33, 35
improvements, for, 26
protected, 27, 33
injuring other trees, 30, 32
larch, 28
life-tenant's rights, 25
limitations, 36
oak, 25
ornamental, 31–34
plantations, 27, 28
power (express) to cut, 33–35
of management, 33

Timber—*continued.*
receiver, 35
remainderman's right, 35
repairs, for, 26, 33–35
ripe, 26, 30
sale proceeds, 25–34
saplings, 32, 34
set-off of improvements, 35
S. L. Acts powers, 26, 27, 33
shelter, planted for, 32
sold with estate, 27, 33, 34
term, effect of, 31
thinnings, 26–28, 33
timber estate, 26, 35
trespassers' cuttings, 28, 31
trust for sale, 31, 35
to invest in land, 35
trustees' cuttings, 30, 31
powers, 34, 35
unauthorized cutting, 28–30, 33
underwood, 27, 34, 47
usage, long, 26
voluntary waste excepted, 34
waste, impeachment of, 25
without impeachment, 31
windfalls, 27, 28, 31
woods, 26
wrongful cutting, 28, 33, 35
young trees, 26, 27, 31

Tithe Rent-charge,
redemption, 118

Tramways, 73, 77

Trees,
dead, 25
improvements, 27
ornamental, 26, 27
other than timber, 26, 27, 28
thinnings, 27
trust for sale, 27

Trenching, 76

Trial Pits,
for mines, 77

Trust for Sale,
accumulation, interim, 3
advowson, 8
consent, with, 4
delay at expense of income, 3, 43
drainage expenses, 63, 64
improvements, 85
interest on incumbrances, 110
interim income, 3, 4, 38
land, 3, 35, 133
leaseholds, 3, 45

Trust for Sale—*continued.*
loss of income, 123
mines, 38–40
mixed fund, 3, 133
partial, 145
power to postpone, 146, 156
to retain, 147
real estate, of, 3, 35, 133
renewal, for, 92
repairs under, 56
residue, 144–147
S. L. Acts, 85
shares, 3
specific property, 3
timber, 31, 35
time fixed for, 145
trees, 27, 28
unproductive land, 123
wasting property, 3, 144

Trust to Invest in Land,
accumulation of interim income, 17, 136
building, 69
drainage work, 69
improvements, 69
interim income, 17, 136
rebuilding, 69
repairs, 60
residue, 136
S. L. Acts provisions, 70
timber estate, purchase of, 35

Trustees,
costs of admittance, 94
appointment, 97, 104
proceedings, 101
defalcations, 123
discretion. *See* DISCRETION
powers. *See* POWERS

Unauthorized Investments,
consol interest, where, 137, 139
full income, where, 9, 10, 143
income from death, 139
losses, 128
power to retain, 147, 148
refunding income, 143
three per cent. interest, where, 142, 143

Underwood,
right to cut, 27
sale proceeds, 47

Unproductive Property,
annuities charged on, 111
apportionment, 52
interest, keeping down, 111
loss of income, 123
insurance, 52

Unproductive Property—*continued.*
rates and taxes, 51
repairs, 57
residue, part of, 52, 57

Unsaleable Property,
residue, part of, 142

Vary, Power to,
effect of, 1, 150

Vesting Order,
costs of, 97

Vinery, 82

Voluntary Payments,
calls on shares, 121
improvements for, 66, 67
incumbrances, of, 118–120
investment, costs of, 97
premiums,
fire policy, 52
life policy, 122
renewal, for, 89
repairs, for, 55
reversion, purchase of, 93

Walls, 80

Warping Expenses, 72, 73, 76, 79

Washhouse, 82

Waste,
equitable, 32, 36
impeachment of, 25, 26
permission, 54
without impeachment of, 31, 40

Waste Land,
reclaiming, 73, 76, 79

Wasting Property,
consol interest, where, 137
conversion of, 137, 142, 146
executor, remainderman, 148
full income, where, 1
interim income clause, 146, 147
power to retain, 147, 148
refunding income, 143
retained, with consent, 143
against wish, 143
mistake, by, 142
settled specifically, 1, 2
specific mention of, 151
three per cent. interest, where, 143
trust for sale, 3, 145
unsaleable, 142
whole income, gift of, 150

Watercourse,
improving, 73, 76
making, 71, 74, 77
repair, 61, 62

Water Defences,
making, 76

Water Meadows,
making, 79

Water Power,
works for application of, 79

Water Supply,
works for, 70, 74, 79, 81

Water Wheels,
making, 74–76

Waterworks Shares,
residue, part of, 139

Weiring, 73, 76, 79

Weirs,
construction of, 74, 77

Wells,
construction of, 74, 77, 79

Wharves,
making, 69

Will,
charge by, 107
residue, 132-157

Windfalls, 27, 31

Wine, 8

Wirework for Hops,
cost of, 79

Woods,
trees grown in, 26

Working Classes,
dwellings for, 78

THE END.

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